NLWJC - KAGAN

STAFF & OFFICE - D.C. CIRCUIT

BOX 004 - FOLDER 012 DC

Elena Kagan Law Review 7 [5]

FOIA Number: Kagan

FOIA MARKER

This is not a textual record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

Collection/Record Group: Clinton Presidential Records

Subgroup/Office of Origin: Counsel Office

Series/Staff Member: Sarah Wilson

Subseries:

OA/ID Number: 14686

FolderID:

Folder Title:
Elena Kagan Law Review 7 [5]

Stack:	Row:	Section:	Shelf:	Position:
V	13	2	11	1

n192 See id. at 111 (finding defendants' argument that the punitive damages award was viewpoint-based "speculative," but noting that "[e]ven if defendants are correct, . . . the power to avoid being punished for any protected expression lay in their own hands").

n193 Id. Although the court made this statement in its state law discussion, this reasoning is implicit in the brief federal constitutional discussion, which relies upon the speech/conduct distinction. See id. at 112 (referring to its state law conclusion in finding "the same conclusion" to obtain "with respect to the First Amendment").

n194 Id. at 118 (Unis, J., dissenting) (quoting Uniform Civil Jury Instruction 35.01).

n195 The court also incorrectly reasoned that because "the First Amendment does not apply to private property that is not devoted to public use," there could be no constitutional challenge to an award of punitive damages based upon a trespass to private personal property. Id. at 112 ("[P]laintiff did not invite members of the general public to climb on or chain themselves to its equipment or otherwise subject itself to the proscriptions of the First Amendment."). In the political protest context, however, the free speech guarantee may impose limits on state tort liability even when some of the protesters' activities are illegal. See NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 17 (1982) ("[T]he presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages."); see also New York Times v. Sullivan, 376 U.S. 254, 265 (1964). In New York Times, the Supreme Court disposed of the argument that the plaintiff could not challenge a state law defamation damages award because: The Fourteenth Amendment is directed against State action and not private action . . . . That proposition has no application to this case. Although this is a civil lawsuit between private parties, the [state] courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. Id.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

III. Relocating Civil Disobedience and Penalty Enhancements Within the Clarified Free Speech Clause Model

A. A Clarified Free Speech Clause Model

The purpose of the current free speech clause model is to effectuate the few words of the Constitution that guarantee "freedom of speech." n196 Because civilly disobedient lawbreaking is publicly valuable expression, it should be analyzed differently than other illegal conduct that is functional only. A complete free speech model should include civil disobedience's public value as well as the harms that it necessarily causes. Several clarifications of the current analytical model can promote an analysis of civilly disobedient

lawbreaking that better fulfills the spirit of the "freedom of speech" guarantee. Diagram B identifies the locations of these clarifications within the current free speech clause model.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n196 U.S. Const., amend. I.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -
[*219]

Diagram B

[SEE TABLE IN ORIGINAL] [*220]

1. The Expressive Conduct Definition

The Court's recent statement that physical assault cannot be "expressive conduct protected by the First Amendment" n197 implies that there are per se categories of nonexpressive conduct without explaining the criteria for the categorization. n198 Its blanket pronouncement stems from the worry that has plagued the Court throughout its review of expressive conduct: That, absent some restriction, "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." n199 The impulse to draw a bright line is understandable-the specter of political assassination as constitutionally protected expression is the oft-cited example of the base of the slippery slope. n200 The Court's statement, however, conflates two categories that do not necessarily go together-expression and constitutional protection. n201 Separating these two strands of analysis substitutes an analytically coherent free speech model for the current categorical definitions.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n197 Wisconsin v. Mitchell, 508 U.S. 476, 484 (1993).

n198 See id.

n199 Id. (quoting United States v. O'Brien, 391 U.S. 367, 376 (1968)).

n200 See William B. Lockhart et al., Constitutional Rights and Liberties 692 (8th ed. 1996) (asking whether "a political assassination [would] be unprotected expression because it is not within the scope of the first amendment or because the government interests outweigh the expressive values"); Cass R. Sunstein, Words, Conduct, Caste, 60 U. Chi. L. Rev. 795, 836 (1993) (noting that the result of an expressive conduct definition that looked only to the two prongs of actor intent and audience understanding "might seem to have extreme consequences- for example, an attempted assassination of the President may well qualify as speech," but emphasizing that this conclusion does not mean the speech is constitutionally protected because the government has a strong interest in protecting the President's life).

n201 See, e.g., Schauer, supra note 118, at 89 91 (distinguishing between constitutional coverage and constitutional protection).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

For the proposition that physical assault is not expressive conduct, the Mitchell Court cited Roberts v. United States Jaycees, remarking on the constitutionality of anti-discrimination legislation that "violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection," n202 and NAACP v. Claiborne Hardware Company, noting in the context of an economic boycott designed to coerce local merchants to respect civil rights that "[t]he First Amendment does not protect violence." n203 Although, like the Mitchell [*221] decision, both of these opinions indicated that certain types of conduct are outside the bounds of free speech clause protection, they did not specifically classify the types of conduct as per se nonexpressive. Instead, in the sentence preceding the widely quoted "special harms" statement from Roberts, the Court explained that "acts of invidious discrimination . . . cause unique evils that government has a compelling interest to prevent-wholly apart from the point of view such conduct may transmit." n204

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n202 468 U.S. 609, 628 (1984) (citing Roberts v. United States Jaycees, 468 U.S. 609, 628 (1984)).

n203 458 U.S. 886, 916 (1982).

n204 Roberts, 468 U.S. at 628.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

In light of this explanation, the next sentence addressing "violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact" means that "such practices are entitled to no constitutional protection" because the government interest outweighs the social value of what might be expressive conduct. Thus, the Mitchell Court's statement that physical assault can never be expressive conduct is best understood as inexact. Even the most egregiously harmful activity may be "potentially expressive," meeting the Court's two-part test: The actor intends to communicate and the audience is likely to understand the communication. n205 Nevertheless, some limited types of conduct will always be unprotected. n206 Rather than indicating a per se judgment as to whether physical assault is expressive, the Mitchell Court's statement should be understood to mean that, because of the individual and social harm inherent in the conduct, the government's interest in preventing physical assault will always outweigh the actor's choice of means of expression. That is, physical assault is per se unprotected rather than per se nonexpressive. n207

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n205 See Spence v. Washington, 418 U.S. 405, 410 11 (1974).

n206 See, e.g., Sunstein, supra note 200, at 834 ("[The] government often does have special and sufficiently neutral justification for regulating conduct.").

n207 See, e.g., id. at 835 ("The key to the distinction [between speech and conduct], often thought to lie in the determination of whether the conduct qualifies for initial protection, actually lies in the fact that government often has good reasons for regulating it.").

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Understanding the Court's statements about violence and the undefined range of "potentially expressive activities" in this way harmonizes its conduct analysis with its pure speech analysis. With speech, too, the Court has defined certain limited categories, balanced them on a per se basis with the government's interest in regulating the speech, and declared those certain types of speech unprotected. n208 Because the "unprotected" designation means that the government may entirely suppress such speech, n209 whether the speech is called [*222] "unprotected" or not speech at all may appear inconsequential. Instead, the initial designation of the activity as "speech" is analytically crucial. By recognizing that the activity within the unprotected category has the outward characteristics of speech, the Court necessarily makes the definition of the unprotected category dependent upon the balance between the activity's expressive value and the government's interest in suppressing it. n210 The point at which this no longer balances on a per se basis marks the outer limit of the unprotected category. n211

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n208 See R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992) ("[T]hese areas of speech can, consistently with the First Amendment, be regulated because of their constitutionally proscribable content.").

n209 The government may entirely suppress the speech based upon the content element that defines it (obscenity, defamation), but any further content discrimination within the class of unprotected speech, unless it falls within an articulated exception, will invoke strict scrutiny review. See id.

n210 See id. at 386 ("[T]he exclusion of 'fighting words' from the scope of the First Amendment simply means that, for purposes of that Amendment, the unprotected features of the words are, despite their verbal character, essentially a 'nonspeech' element of communication.").

n211 See Miller v. California, 413 U.S. 15, 24 (1973) (requiring, for a communication to be obscene, that "the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest"; that the "work depict[ ] or describe[ ], in a patently offensive way, sexual conduct specifically described" by state law; and that "the work, taken as a whole, lack[ ] serious literary, artistic, political or

scientific value"); Gooding v. Wilson, 405 U.S. 518, 524 (1972) (paraphrasing Chaplinsky fighting words test to require that the words "have a direct tendency to cause acts of violence by the person to whom individually, the remark is addressed"); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (requiring for constitutionally unprotected incitement that "such advocacy [be] directed to inciting or producing imminent lawless action and [be] likely to incite or produce such action"); New York Times v. Sullivan, 376 U.S. 254, 266 (1964) (defining libel as a false statement of fact and imposing other proof requirements to avoid chilling politically valuable speech).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

This characterization of the Mitchell Court's reference to physical assault as striking the same balance with respect to conduct as it has with respect to certain speech categories is important because it means that the per se categories of unprotected conduct must have a limit, too, where the balance between an act's expressive value and resulting harms no longer obtains. Specifically, the Court's potentially broad statements as to the unprotected nature of "violence" and "physical assault" do not necessarily apply to all acts of lawbreaking. Rather, as illegal acts become less violent and less personally directed, the balance between expressive value and social harm may come out differently according to the circumstances of particular actions. Diagram C illustrates this first clarification of the current free speech clause model.

[*223] Diagram C

[SEE TABLE IN ORIGINAL]

2. The Same Multi-Factor Balancing Test Applies to Expressive Conduct as to Content-Neutral Speech Regulations

According to the Court, there is "little, if any, differen[ce]" between the test it applies to expressive conduct and the one it applies to content-neutral speech regulations. n212 This should be a reality that renders some government rules that suppress expressive conduct unconstitutional because of their expressive impact, regardless of the government's motivation. n213

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n212 Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 & n.8 (1984).

n213 See Martin H. Redish, The Content Distinction in First Amendment Analysis, 34 Stan. L. Rev. 113, 130 (1981) ("[C]ontent-neutral restrictions may significantly undermine the value of free expression by imposing limitations on the opportunity for individual expression.").

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

On the speech side, the Court's analytical model reflects the recognition that government actions may violate the free speech guarantee even if the [*224] government's target is not the communication aspect of the regulated activity. n214 An important part of the analysis is determining the weight of the government interest, not just the fact that it has some substance. n215 Whether alternate means for the government to serve its interest exist is another important consideration, n216 with the Court sometimes looking to whether the expression-restrictive government action is significantly underinclusive of other obvious contributors to the problem it is addressing. n217 The impact on expression is an important consideration, both absolutely n218 and as to the types of speakers affected. n219 Whether alternate, similarly effective means are [*225] available to the speaker to communicate is a crucial consideration. n220 The result is a true balance of social values-the public interest in robust and uninhibited political dialogue against the generally shared interest in having the majority government efficiently accomplish its nonspeech-related goals.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n214 The designation "content-neutral" means that the government has adopted a regulation of speech "without reference to the content of the regulated speech." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (reviewing noise regulations (quoting Community for Creative Non-Violence, 468 U.S. at 293)).

n215 See, e.g., City of Ladue v. Gilleo, 512 U.S. 43, 53 (1994) ("Ladue's sign ordinance is supported principally by the City's interest in minimizing the visual clutter associated with signs, an interest that is concededly valid but certainly no more compelling than the" City's interest in maintaining a stable, racially integrated neighborhood, which was not sufficient to support a prohibition of residential 'For Sale' signs in Linmark Assoc., Inc. v. Willingboro, 431 U.S. 85 (1977)).

n216 See, e.g., City of Ladue, 512 U.S. at 58 59 ("We are confident that more temperate measures could in large part satisfy Ladue's stated regulatory needs without harm to the First Amendment rights of its citizens.").

n217 See, e.g., id. at 51 ("While surprising at first glance, the notion that a regulation of speech may be impermissibly underinclusive is firmly grounded in basic First Amendment principles."); Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (requiring, to justify its billboard ban, that San Diego demonstrate a comprehensive coordinated effort in its commercial and industrial areas to address other obvious contributors to an unattractive environment).

n218 See, e.g., City of Ladue, 512 U.S. at 55 ("Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent-by eliminating a common means of speaking, such measures can suppress too much speech.").

n219 See, e.g., id. at 57 ("Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute."); City Council v. Taxpayers for Vincent, 466 U.S. 789, 812 13 n.30 (1984)

(noting that "the Court has shown special solicitude for forms of expression that are much less expensive than feasible alternatives and hence may be important to a large segment of the citizenry," but that "this solicitude has practical boundaries"); Martin v. City of Struthers, 319 U.S. 141, 146 (1943) ("Door to door distribution of circulars is essential to the poorly financed causes of little people."); see also Kovacs v. Cooper, 336 U.S. 77, 102 (1949) (Black, J., dissenting). Black stated that: Laws which hamper the free use of some instruments of communication thereby favor competing channels . . . . There are many people who have ideas that they wish to disseminate but who do not have enough money to own or control publishing plants, newspapers, radios, moving picture studios, or chains of show places. Id.

n220 See, e.g., City of Ladue, 512 U.S. at 54 (noting that the City, by banning residential signs, had "almost completely foreclosed a venerable means of communication that is both unique and important").

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Why is the purportedly identical balancing of expressive conduct restrictions less even-handed in practice? The answer appears to be that with conduct the Court has implicitly resolved some of the considerations on a per se basis in the government's favor. The assumption seems to be that an adequate speech alternative exists to expressive conduct. n221 Thus, the overall effect of the governmental action on public dialogue is de minimis. n222 But the Court's own observations belie this assumption. n223 Also, because conduct restrictions are not aimed at normal means of communication, n224 there may appear to be little danger of a disproportionate impact upon speakers with certain points of view. Yet, in those instances where lawbreaking is, in fact, a means of communication, the expression-related effect of enforcing the law will fall disproportionately upon those who oppose government action. n225

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n221 See Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984) (noting that the National Park Service ban on overnight sleeping could not be faulted "on the ground that without overnight sleeping the plight of the homeless could not be communicated in other ways").

n222 See, e.g., Barnes v. Glen Theatre, Inc., 501 U.S. 560, 571 (1991) ("[T]he requirement that the dancers don pasties and a G-string does not deprive the dance of whatever erotic message it conveys; it simply makes the message slightly less graphic.").

n223 See, e.g., Spence v. Washington, 418 U.S. 405, 410 (1974) (Flags "are a form of symbolism comprising a 'primitive but effective way of communicating ideas'" and may represent "a short cut from mind to mind." (quoting Board of Educ. v. Barnette, 319 U.S. 624, 632 (1943))).

n224 Compare United States v. O'Brien, 391 U.S. 367, 376 (1968) (referring to the "alleged communicative element in [the draft card burning] conduct") with City of Ladue, 512 U.S. at 56 ("[W]e are not persuaded that adequate substitutes exist for the important medium of speech that Ladue has closed off.") (emphasis added).

n225 See, e.g., Geoffrey S. Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. 189, 221 22 (1983) ("As applied to expression, the [anti-draft card burning statute in O'Brien] had an obvious disparate impact on those who opposed government policy, for who would destroy a draft card as an expression of support for government policy?").

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

None of these particular considerations dictate a result. However, all of [*226] them should enter into a determination of whether a particular government action comports with the free speech guarantee because they may vary according to the specific expressive conduct at issue. That is, none of them should be removed from the analysis just because the impacted activity is conduct rather than verbal expression. Diagram D portrays this second clarification.

Diagram D

[SEE TABLE IN ORIGINAL] [*227]

3. The Overriding Prohibition on Government Viewpoint Discrimination

The core free speech principle is that the government may not "proscrib[e] speech . . . because of disapproval of the ideas expressed." n226 But what of conduct? If conduct is expressive, then a crucial part of the analysis asks whether the government action is message-directed. n227 If so, the conduct effectively becomes speech, and the government must justify its restriction under the strict scrutiny standard. n228 If conduct is nonexpressive, its treatment under the current model is less clear. Some of the Court's statements imply that once conduct is deemed nonexpressive, free speech analysis is over. n229

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n226 R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

n227 See O'Brien, 391 U.S. at 367, 377 78.

n228 See supra notes 65 66 and accompanying text.

n229 See Brownstein, supra note 132, at 631 ("[O]ne might imply [sic] that viewpoint-discriminatory regulations of conduct are constitutional from the Court's emphasis in Mitchell on the fact that the hate crimes statute only regulated conduct as the basis for distinguishing Mitchell from R.A.V.").

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

The better view, however, is that the rule against government viewpoint discrimination cuts across all government actions, from those that impact pure

speech to those that impact nonexpressive conduct. n230 In any situation where a government action distinguishes on the basis of viewpoint the "specter" exists "that the government may effectively drive certain ideas or viewpoints from the marketplace." n231 Thus, strict scrutiny review must apply any time that a government regulation of anything targets a particular point of view.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n230 See, e.g., id. at 629 30. Brownstein stated that: [I]t is entirely irrelevant that [a] viewpoint- discriminatory regulation of unprotected speech is directly restricting speech, and not conduct . . . . [Law] that allows Republicans to physically assault Democrats but punishes Democrats for physically retaliating against their assailants is probably even more violative of First Amendment principles than a law allowing Republicans, but not Democrats, to use fighting words in public debates. Id. See also Weinstein, supra note 112, at 361 ("Although no Supreme Court case is precisely on point, this [principle that government may not constitutionally enact laws that, by their terms, favor or disfavor any political ideology] should extend even to regulation of criminal activity that is neither speech nor expressive conduct.").

n231 R.A.V. v. City of St. Paul, 505 U.S. 377, 387 (1991).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - -

According to established precedent, although this broad rule against viewpoint discrimination requires a court to look for an intent discernable on the face of the government action, n232 the philosophy behind the rule is not so [*228] limited. n233 As the Court has recognized when looking with care at content- neutral speech restrictions and even more specifically at the rule's disproportionate impact on particular types of speakers, a government motive to suppress speech is not the only evil that the free speech clause addresses. n234 To fully guarantee that minority points of view remain part of the political dialogue, the Constitution must protect expression from unconscious as well as purposeful silencing. Thus, the general rule against government viewpoint discrimination suggests that some level of scrutiny beyond the extraordinarily deferential rational basis should be triggered when any government action has the effect of disproportionately silencing expression of a particular point of view. n235 Specifically, this disproportionate viewpoint impact of a government action should be one of the factors in the constitutional balance whether a government regulation impacts expression through the means of speech or conduct.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n232 See, e.g., Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 763 (1994) (In determining whether a government action is viewpoint-based, "the government's purpose [is] the threshold consideration.").

n233 See, e.g., Williams, supra note 75, at 676 94 (demonstrating that viewpoint discriminatory impact is of concern under a number of free speech theories).

n234 See, e.g., Stone, supra note 225, at 189 90 (arguing that more than a government motive to suppress speech underpins the content-based/content-neutral speech distinction).

n235 See, e.g., Williams, supra note 75, at 706 07 (arguing that the standard of review in symbolic speech cases should rise to the level of strict scrutiny).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Diagram E portrays this last clarification of the current free speech clause model. Diagrams F and G, first with the clarification locations identified, then without such identifications, portray the fully clarified free speech clause model that should guide analysis of penalty enhancements applied to civil disobedience.

Diagram E

[SEE TABLE IN ORIGINAL] [*229] Diagram F

[SEE TABLE IN ORIGINAL] [*230] Diagram G

[SEE TABLE IN ORIGINAL] [*231]

B. Civil Disobedience's Place in the Clarified Free Speech Clause Model

Civil disobedience, as intentional lawbreaking engaged in for the purpose of expression and under circumstances where it is likely to be understood, n236 must be viewed as expressive conduct. Yet civil disobedience is importantly distinct both from the broad class of lawbreaking and the broad class of expressive conduct, thus requiring a free speech analysis all its own.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n236 See Spence v. Washington, 418 U.S. 405, 415 (1974) (establishing this two-part test).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

The usual lawbreaking is where one individual asserts his will against the will of the majority (embodied in the law) for selfish purposes, accompanied by an effort to avoid detection and punishment. The act is functional, rather than expressive, n237 and the act evidences contempt for the democratic principle of majority rule. The civil disobedient also asserts his will against the will of the majority, but in a different way and for a different purpose. Civil disobedience is a public act. n238 The purpose is to convey a political message from the minority to the majority. n239 The civil disobedient's willingness to accept the punishment demonstrates a respect for the general principle of the rule of law at [*232] the same time that the act communicates dissent from the law's particular provisions. n240 All of these factors combined transform

a presumptively socially harmful criminal act into socially valuable expressive conduct that, unlike most other acts of lawbreaking, should trigger free speech clause analysis. n241

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n237 See Clark v. Community for Creative Non-Violence, 468 U.S. 288, 294 95 (1983) (separating sleeping as functional from sleeping as expressive).

n238 See, e.g., Carl Cohen, Civil Disobedience: Conscience, Tactics, and the Law 39 ("Civil disobedience is an act of protest . . . publicly performed."); Rawls, supra note 11, at 366 ("[C]ivil disobedience is a public act."); Frank M. Johnson, Civil Disobedience and the Law, 44 Tul. L. Rev. 1, 6 (1969) (stating that civil disobedience is "an open, intentional violation of law"); Keeton, supra note 98, at 508 ("[The] act of civil disobedience [is] . . . an act of deliberate and open violation of law."); Martha Minow, Breaking the Law: Lawyers and Clients Struggle for Social Change, 52 U. Pitt. L. Rev. 723, 733 n.38 (1991) ("'Civil disobedience' is . . . undertaken in a public way . . . ."); Sanford J. Rosen, Civil Disobedience and Other Such Technicalities: Law Making Through Law Breaking, 37 Geo. Wash. L. Rev. 435, 442 (1969) ("Civil Disobedience . . . may be defined as open."); van den Haag, supra note 94, at 27 ("[C]ivil disobedience [occurs] when a law is deliberately disobeyed to publicly demonstrate opposition . . . to laws or policies of the government."). But see Michael J. Perry, Morality, Politics and Law 118 (1988) ("The position that disobedience must be open or public to be legitimate is also untenable.") (footnote omitted).

n239 See, e.g., Rawls, supra note 11, at 366 ("One may compare [civil disobedience] to public speech, and being a form of address, an expression of profound and conscientious political conviction."); Bruce Ledewitz, Civil Disobedience, Injunctions, and the First Amendment, 19 Hofstra L. Rev. 67, 122 23 ("[Civil disobedience] illustrates depth of commitment by the minority-a factor the majority should wish to consider in setting policy. [Civil disobedience] grabs the attention of the majority, thus promoting debate and lessening public apathy.").

n240 See Rawls, supra note 11, at 366. Rawls stated that: [Civil disobedience] expresses disobedience to law within the limits of fidelity to law, although it is at the outer edge thereof. The law is broken, but fidelity to law is expressed by the public and nonviolent nature of the act, by the willingness to accept the legal consequences of one's actions. Id. (footnote omitted).

n241 See, e.g., Ledewitz, supra note 6, at 571 (condemning the "binary thinking of legal/illegal" as "ridiculous in the context of political protest," but noting that "it is difficult for judges" to see value in law-violation).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

The fact, however, that civil disobedience's social value is inextricably entwined with lawbreaking distinguishes it as a subset of the broader class of all expressive conduct. Whereas conduct that does not depend upon lawbreaking to convey its message can, at least in theory, be immune from punishment, n242 such punishment is part of civil disobedience's definition. n243 Thus, under the

clarified free speech clause model, the base act of civil disobedience is covered. That is, it qualifies as expressive conduct and thus is subject to the multi-factor balancing test. Yet the result of this balancing in any particular case of civil disobedience will be that it is ultimately unprotected. This result stems from the general commitment to orderly democratic government that undergirds all constitutional models. While the Constitution guarantees certain individual rights, its underlying democratic philosophy is that relevant majorities can legitimately make laws and enforce them against dissenters. n244 Recognizing [*233] lawbreaking as a protected form of expression could lead to anarchy as everyone disobeyed laws with which they disagreed and then sought constitutional protection for their lawless actions. n245 The general presumption of the rule of law is that the proper form of protest against particular government actions is through lawful speech and action designed to change it. n246 Thus, whatever the expressive value of the act of intentional lawbreaking-and it may be substantial-the government interests both in vindicating the private interests affected n247 and, more importantly, in protecting the general societal interest in maintaining the rule of law will always outweigh it. n248

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n242 The crux of the expressive conduct claim is that a regulation, valid as applied to purely functional conduct, may not constitutionally be applied to restrict expression. Where lawbreaking is not a crucial part of the expression, lifting the punishment in a particular instance is an accommodation and, when recognized as a limited exception based upon important competing interests, preserves the principle of the rule of law. Thus, for example, had the Community for Creative Non-Violence protesters been permitted to remain during the night in the government park, their message, communicated through sleeping without a permanent shelter, would have remained, and the government would have retained the ability to enforce the anti-sleeping regulation against others who did not have as substantial an expressive purpose or none at all. See Clark v. Community for Creative Non- Violence, 468 U.S. 288, 295 (1983) (Initial erection of the tent cities was with the permission of the Park Service, so breaking the law was not part of the message.).

n243 See, e.g., Ledewitz, supra note 6, at 571 ("[B]y far the greatest difficulty in protecting the sit-in is simply that the sit-in is, and must remain, illegal.").

n244 See, e.g., Cox v. Louisiana, 379 U.S. 536, 554 55 (1965) ("The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy."); Rawls, supra note 11, at 363 ("[The question of when civil disobedience is justified] involves the nature and limits of majority rule.").

n245 See United States v. Berrigan, 283 F. Supp. 336, 339 (D. Md. 1968). This district court stated that: No civilized nation can endure where a citizen can select what law he would obey because of his moral or religious belief. It matters not how worthy his motives may be. It is axiomatic that chaos would exist if an individual were permitted to impose his beliefs upon others and invoke justification in a court to excuse his transgression of a duly-enacted law. Id.

n246 See, e.g., Adderly v. Florida, 385 U.S. 39, 48 (1966) ("[P]eople who want to propagandize protest or views [do not] have a constitutional right to do so whenever and however and wherever they please."); Michigan AFL-CIO v. Michigan Employment Relations Comm'n, 538 N.W.2d 433, 492 (Mich. App. 1995) ("[A]ny citizen[ ] who wishes to protest may do so by lawful means, such as informational picketing, passing out leaflets, or addressing the school board during a public comment period.").

n247 See, e.g., Adderly, 385 U.S. at 47. The Supreme Court stated that: Nothing in the Constitution of the United States prevents Florida from even-handed enforcement of its general trespass statute [against those who break it as a form of political protest] . . . . The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. Id.

n248 See, e.g., Pennsylvania v. Berrigan, 472 A.2d 1099, 1126 (Pa. Super. Ct. 1984). From the earliest times when man chose to guide his relations with fellow men by allegiance to the rule of law rather than force, he has been faced with the problem how best to deal with the individual in society who through moral conviction concluded that a law with which he was confronted was unjust and therefore must not be followed. . . . However, [thinkers throughout the ages] have been in general agreement that while in restricted circumstances a morally motivated act contrary to law may be ethically justified, the action must be non-violent and the actor must accept the penalty for his action. Id. (quoting United States v. Moylan, 417 F.2d 1002, 1008 09 (4th Cir. 1969)).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[*234]

Nor does the disproportionate impact of enforcing the law against civil disobedients lead to a different constitutional conclusion. If this impact alone were enough to invalidate such enforcement, the rule of law would be undermined as everyone could become laws unto themselves rather than being bound by the principle of majority rule. n249 Where a particular type of conduct warrants punishment solely for the individual and social harms caused by its functional aspects, across-the-board application of the punishment to include those with an expressive purpose is appropriate. n250 In this constitutional democracy, everyone presumptively has the ability to participate in forming the law ultimately adopted by the majority, including the penalty provisions which generally apply to all lawbreakers who cause a particular type of harm. When dissatisfied minority members resort to lawbreaking to express their disagreement with majority action, they should justly pay the price that the majority has determined appropriate for the individual and social harms caused by the functional components that their acts share with all others who engage in the same class of unlawful conduct. n251 This crucial role of punishment to the social value of the civil disobedience thus distinguishes it as a subset within the broad category of expressive conduct.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n249 See, e.g., Non-resident Taxpayers Ass'n v. Philadelphia, 341 F. Supp. 1139, 1145 (D.N.J. 1971). The district court stated that: [The conclusion that plaintiff's interest in communicating his disagreement with the tax laws by failing to pay them outweighs the government's interest in uniform collection]

would tend to countenance almost any variety of "symbolic speech" as being within the protection of the First Amendment and would foster civil disobedience. Surely, the First Amendment cannot be judicially expanded to support such a construction. Id. at 1146.

n250 See, e.g., Adderly, 385 U.S. at 47 ("Nothing in the Constitution of the United States prevents Florida from even- handed enforcement of its general trespass statute against [political protesters].").

n251 See, e.g., Michigan AFL-CIO, 538 N.W.2d at 493 ("A citizen may . . . choose to protest by violating the law, e.g., by staging a sit-in or other form of trespass protest. When citizens do so, they must face the consequences of their actions . . . .").

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Yet it is also critical to clarify exactly what type of penalty affects this distinction within the expressive conduct category. This is the normal penalty applied to the functional component of the acts within the broad class of lawbreaking. Specifically, when a protester chooses to break the law, she must accept the punishment the majority has deemed appropriate for the individual [*235] and social harms caused by the functional components of her action. Once she does so, however, she has begun the political dialogue, offering her sacrifice as proof of her sincerity and the depth of her convictions. n252 Accepting the base penalty for her action lends social value to her communication, distinguishing her lawbreaking from the broad class that includes all illegal actions for purposes of further free speech clause analysis. It is this further analysis that must occur when the government identifies certain functional acts as qualifying for enhanced punishment because of some characteristic that may correlate to the civil disobedient's expressive purpose.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n252 See, e.g., Rawls, supra note 11, at 367 ("We must pay a certain price to convince others that our actions have, in our carefully considered view, a sufficient moral basis in the political convictions of the community.").

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

C. Penalty Enhancement's Place in the Clarified Free Speech Clause Model

Analysis of the Mitchell Court's reasoning in light of the clarified free speech clause model reveals the constitutional limits of penalty enhancements. To recapitulate, the Mitchell Court addressed the defendant's claim of unconstitutional action in several ways. First, it noted that motive may legitimately define unlawful conduct and determine the severity of punishment. n253 Second, it stated that the enhancement statute was "aimed at conduct unprotected by the First Amendment" rather than expression. n254 Third, it noted that "special harms" stemming from the motive-based crimes warranted enhanced

punishment. n255 Only the third has independent weight under the clarified free speech clause model.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n253 See Wisconsin v. Mitchell, 508 U.S. 476, 484 85 (1993).

n254 Id. at 487.

n255 Id. at 484.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The first, the traditional consideration of motive in defining and punishing offenses, only makes sense when the motive is defined as a bad thing. n256 Under any free speech clause model, it cannot be "bad" merely as a disfavored belief. n257 It has to be bad for a nonspeech-related reason-specifically a reason that connects the belief with socially harmful conduct. n258 Thus, the first [*236] justification is essentially the same as the third, which looks to the nonspeech- related harms that result from the motive.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n256 See id. at 485 (noting that a "bad" as opposed to a "good" motive is a legitimate sentencing consideration) (citing 1 W. LeFave & A. Scott, Substantive Criminal Law 3.6(b), at 324 (1986)).

n257 Id. at 468 ("[A] defendant's abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge.").

n258 Id. (noting that where defendant's racial animus was "related" to the crime, it could be considered in sentencing).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The second relies on a speech/conduct distinction that tips the scales dramatically in favor of a law's validity where it aims at nonspeech-related consequences of conduct. n259 Under the revised model, which requires some serious level of consideration of the expressive impact of government action regardless of the government's purpose, the speech/conduct distinction would not be dispositive. Rather, where the conduct suppressed by the government action is expressive, the same balancing test would apply as to speech activities. The significance of the speech/conduct distinction in this instance would be only to signal that, because the government action is directed at conduct, it is less likely to substantially impact expression in the broad range of cases to which it may apply than a government action directed at a usual means of communication. In the smaller range of applications where the lawbreaking conduct is expressive, however, the signal is misleading. n260 Despite the presumption gleaned from the broad class of cases, in this particular instance the government action substantially affects expression.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n259 See supra text accompanying notes 72 75 (explaining that the expressive conduct balancing test equates to minimal rational basis scrutiny in application).

n260 Cf. Williams, supra note 75, at 706 07 (arguing that, because of a greater expressive impact, in the narrow range of cases where symbolic conduct is at issue a stricter standard of review should apply than in instances where the government action restricts usual means of expression).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

It is the third reason-that the triggering characteristic plus the underlying conduct result in "special harms"-that must ground the constitutional analysis. The existence of these special harms justifies the government action in two distinct ways. First, separate, nonspeech-related harms give proof of a legitimate, nonspeech- related government motive. n261 Second, the "unique evils" attest to a different balance between the government interest and the potentially expressive conduct than occurred with the base penalty. n262 That is, the existence of special harms flowing from the subset of conduct that warrants the enhancement indicates that the characteristic that triggers the enhancement changes the underlying conduct in a way that tips the constitutional balance in favor of the government's interest. n263 Thus, as with application of the base [*237] penalty for the functional components of the broad class of conduct, it is a balance between the government interest in enhancing the penalty and the expressive value of the underlying conduct-the act plus the distinguishing characteristics-that must justify the enhancement.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n261 See Mitchell, 508 U.S. at 488 ("The State's desire to redress these perceived harms provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases.").

n262 See Roberts v. United States Jaycees, 468 U.S. 609, 629 30 ("In prohibiting [acts of invidious discrimination], the Minnesota [Human Rights] Act therefore responds precisely to the substantive problem which legitimately concerns the State . . . ." (quoting City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 810 (1984))).

n263 See Mitchell, 508 U.S. at 488 ("[I]t is but reasonable that among crimes of different natures those should be most severely punished, which are the most destructive of the public safety and happiness." (quoting William Blackstone, Commentaries on the Laws of England 16 (1962))).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

IV. Applying Penalty Enhancements to Civil Disobedience Under the Clarified Free Speech Clause Model

Within both the current and the clarified free speech clause model, the breadth of a penalty enhancement may be important proof of its constitutionality. Specifically, application of a penalty enhancement to motives that may encompass a range of viewpoints on a political topic may shield it from the strict scrutiny that should apply if the government targets a particular point of view. n264 This breadth of coverage carries its own danger, which is overinclusion. n265 Although a conduct-directed law may be valid in the bulk of its applications, it may be invalid in the more unusual instance where its application restricts constitutionally protected expression. n266 Because acts of civil disobedience constitute a segregable subset of acts that differs in a constitutionally significant way from the broad class of acts to which a penalty enhancement provision may apply, such acts must be isolated and separately analyzed to determine whether imposition of the enhancement comports with the free speech clause guarantee.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n264 See, e.g., United States v. Dinwiddie, 76 F.3d 913, 923 (8th Cir. 1996) (Because "FACE would prohibit striking employees from obstructing access to a clinic in order to stop women from getting abortions, even if the workers were carrying signs that said, 'We are underpaid!' rather than 'Abortion is wrong!'" it "is content neutral and, therefore, need not survive strict scrutiny.").

n265 Where protected expression comprises a significant portion of a law's target, it may be facially overbroad and therefore unenforceable in any application. See, e.g., Board of Airport Comm'n of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569, 575 77 (1987) (invalidating rule that proscribed all "First Amendment activities" in airport terminal).

n266 See Tribe, supra note 54, at 1022 ("[A]lmost every law, such as [an] ordinary trespass ordinance . . . , is potentially applicable to constitutionally protected acts; that danger does not invalidate the law as such but merely invalidates its enforcement against protected activity.").

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -
[*238]

A. Factors in the Constitutional Balance Presumptively Protect Civil Disobedience from Penalty Enhancement

1. Civil Disobedience's Social Value

The social value of the expression lost when an ostensibly conduct-directed government action silences civilly disobedient expression must be a distinct factor in the balance that determines the action's validity. Civil disobedience is a part of a respectful public dialogue n267 about an intrinsically political topic-the majority's decision as to what should be the specific content of its

law. The expression is about justice, fairness, political participation-issues in the stratosphere of the free speech hierarchy. n268 Moreover, it is political protest that, in its lawful manifestations, occupies a central place in the free speech clause's range of protection. n269

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n267 See, e.g., Linda Stewart Ball, NAACP Chief Trains People in Civil Disobedience, Dallas Morning News, Mar. 16, 1997, at 40A (quoting a county commissioner who engaged in civil disobedience to say that "civil disobedience training is needed to educate residents about the protestors' goals").

n268 See, e.g., Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 483 (1988) ("Political speech, we have often noted, is at the core of the First Amendment."); Buckley v. Valeo, 424 U.S. 1, 45 (1976) (characterizing campaign contribution and expenditure limits as impacting "core First Amendment rights of political expression"); Schultz v. Frisby, 807 F.2d 1339, 1344 (7th Cir. 1986) ("[I]ssues of public concern occup[y] the 'highest rung of the hierarchy of First Amendment values.'" (quoting, inter alia, Carey v. Brown, 447 U.S. 455, 467 (1980))).

n269 See, e.g., Boos v. Barry, 485 U.S. 312, 318 (1988) (stating that prohibition of protest signs within 500 foot radius of an embassy "operates at the core of the First Amendment by prohibiting petitioners from engaging in classically political speech"); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 14 (1982) ("While States have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the [protest] boycott in this case."); Christina E. Wells, Abortion Counseling as Vice Activity: The Free Speech Implications of Rust v. Sullivan and Planned Parenthood v. Casey, 95 Colum. L. Rev. 1724, 1763 (1995) ("Protests of any kind raise classic free speech issues."); see also Edwards v. South Carolina, 372 U.S. 229, 235 (1963) (characterizing a protest gathering that constituted a trespass onto state government property as "an exercise of . . . basic constitutional rights in their most pristine . . . form"); Shiffrin, supra note 72, at 79 ("[T]he protection of dissent and its nurturance is a major American value.").

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

That civil disobedience involves lawbreaking does not divest it of all positive social value. The political expression remains, often augmented by the publicity that the lawbreaking creates. n270 From before the American [*239] Revolution n271 through anti-slavery activities, n272 the women's suffrage movement, n273 civil rights n274 and anti-war activism, n275 up to the current environmental, n276 animal rights, n277 gay rights, n278 and abortion-related protests, n279 to name a few, n280 civil disobedience has contributed to the [*240] American political dialogue. Although it is lawbreaking, civil disobedience enjoys a level of public acceptance that distinguishes it from ordinary illegal actions. n281

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n270 See, e.g., Albert Eisele, The Scylla and Charybdis of Welfare Reform, The Hill, Dec. 13, 1995, at 26 (contrasting "[s]everal sharply different, and perhaps equally valid, approaches to the debate over how to clean out the Augean stables of the nation's muddled welfare system" that occurred "on the same day last week": "One was a highly visible and dramatic act of civil disobedience that took place in the Capitol Rotunda" that "received the most media attention," while the "other was a little-noticed and thoughtful exchange of viewpoints by two luncheon speakers at the Georgetown University Conference Center"); Harrie, supra note 2, at A9 (describing House gallery protest by women opposed to legislature's treatment of low-income Utahns, after which a representative "scrambled upstairs to question [a television reporter] about whether he knew of the demonstration in advance and to attempt to dissuade him from airing a tape of the demonstration: "There's the potential when television cameras cover that of encouraging other groups," the representative said).

n271 See Civil Disobedience in America 20 (David R. Weber ed., 1978) (chronicling the origin and history of American civil disobedience).

n272 See, e.g., Robert M. Cover, Justice Accused: Antislavery and the Judicial Process 175 91 (1975) (detailing the activities of abolitionists and the judicial response); Matthew Lippman, Liberating the Law: The Jurisprudence of Civil Disobedience and Resistance, 2 San Diego Just. J. 299, 317 28 (1994) (same).

n273 Perhaps the most famous such incident was the prosecution of Susan B. Anthony for illegal voting. See Civil Disobedience in America, supra note 271, at 184 85.

n274 See, e.g., Videotape: Eye on the Prize Video Series (Judith Vecchione 1987) (PBS Home Video) (chronicling civil rights movement civil disobedience such as lunch counter sit-ins and freedom rides).

n275 See generally Steven E. Barkan, Protestors on Trial (1985) (chronicling history of anti-war movement, including acts of civil disobedience).

n276 See, e.g., Martinez, supra note 2, at B1. Martinez describes an environmental activist training camp where students can "take their activism beyond letter-writing campaigns . . . to 'direct action'[:] Pioneered by Greenpeace in the '80's, such pro-environmental efforts include boarding ships accused of using illegal fishing nets, occupying trees slated for logging and, most frequently, hanging huge banners from buildings." Id.

n277 See, e.g., James M. Jasper & Dorothy Nelkin, The Animal Rights Crusade (1992).

n278 See, e.g., Levy, supra note 2, at A1 (chronicling ten-year history of ACT-UP's "audacious media events").

n279 See, e.g., S. Rep. No. 103-117, at 12 (1993) (chronicling the activities of anti-abortion protesters, including civil disobedience); Suzanne Staggenborg, The Pro- Choice Movement (1991) (chronicling the activities of the pro- choice movement, including civil disobedience).

n280 The news burgeons with accounts of recent acts of civil disobedience on a wide range of topics. See, e.g., Baltimore Sun, Jan. 11, 1996, at 2A ("More

than 130 people were arrested at Yale University yesterday for blocking a street in a show of civil disobedience over the university's treatment of graduate students."); Disabled Demonstrate for Home Care, UPI, Oct. 23, 1995, available in LEXIS, Nexis library, UPI file ("Some 400 activists for the disabled are [engaging in nonviolent civil disobedience] in Lansing Monday in support of home-based care alternatives."); Inside Politics (Cable News Network, July 20, 1995) (describing civil disobedience and arrests protesting the University of California's proposed abandonment of race as a consideration in admissions).

n281 See Ronald Dworkin, A Matter of Principle 105 (1985) ("Americans accept that civil disobedience has a legitimate if informal place in the political culture of their community."); Eisele, supra note 270, at 26 (describing an act of civil disobedience to protest welfare cuts as "valid": "I was struck by the protesters' courage, conviction and evident compassion for the poor"); Ledewitz, supra note 239, at 105 ("[C]ivil disobedience . . . has become an established part of American political life."); Miller, supra note 17, at A4 (noting that anti-nuclear protest organizers "have been meeting with [the police chief] about the [planned] acts of civil disobedience").

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

To be sure, that the means of communication is lawbreaking means that it likely results in individual and social harms not present when the expression is lawful. n282 Certainly these harms must be part of the constitutional balance that determines whether the government may enforce the law. However, they must be isolated and placed where they belong in the analysis-under consideration of the nature and weight of the government's interest. They are part of the balance, but not alone determinative. The social value of the lawbreaking expression must have a distinct, strong weight in the constitutional balance.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n282 Yet even when protest speech is lawful, it may cause substantial individual and social harms. See, e.g., Madsen v. Women's Health Ctr., 512 U.S. 753, 774 (1994) (striking down prohibition on all uninvited approaches by anti-abortion protesters of women seeking abortions: "'As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment'" (quoting Boos v. Barry, 485 U.S. 312, 322 (1988))).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

2. The Importance of the Means of Communication

That content-directed government actions may silence civilly disobedient expression might not be troublesome if, as seems often to be the assumption, means of communication other than lawbreaking are available and equally effective. n283 Lawbreaking, however, is a unique mode of communication. n284

It [*241] grabs the majority attention in a way that lawful means may not, n285 signifying not only a distinct substantive message, n286 but also signaling the protester's depth of commitment in an induplicable way. n287 A lone African American woman refusing to move to the back of a segregated bus conveys a different message than if she were to circle the bus stop with a picket sign or distribute handwritten circulars to advertise her protest. n288 The same conclusion, we must acknowledge, holds true for the comparison between the act of bombing the Alfred P. Murrah Federal Building in Oklahoma City as opposed to writing a letter to the editor protesting the injustices alleged to have occurred in Waco. n289 [*242] In both instances, the illegal action contributes something profoundly different to the public dialogue than would the legal means of communication.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n283 See, e.g., Tribe, supra note 54, at 983 (arguing that the draft card-burner O'Brien "[m]ade no showing that alternative, equally effective, ways of expressing his message were unavailable. He could, after all have burned a copy of his draft card in front of the very same audience as a means of making the very same point").

n284 See, e.g., Ely, supra note 3, at 1489 90 ("[M]uch of the effectiveness of O'Brien's communication [derived] precisely from the fact that it was illegal.").

n285 See, e.g., Charles R. DiSalvo, Abortion and Consensus: The Futility of Speech, the Power of Disobedience, 48 Wash. & Lee L. Rev. 219, 226 (1991) ("Civil disobedience can move people when argumentation and exhortation fail."); see also University of Utah Students Against Apartheid v. Peterson, 649 F. Supp. 1200, 1205 n.9 (D. Utah 1986) ("While the mass media often pays little attention to unorthodox or unpopular ideas, dramatic displays of action capture media attention when words alone will not."); Vincent Blasi, The Checking Value in First Amendment Theory, 1977 Am. B. Found. Res. J. 521, 640 ("[The] kind of stimulus necessary to activate the political conscience of [the] populace sometimes can be created only by transcending rationality and appealing to more primitive, more basis instincts [through symbolic conduct]."); Ball, supra note 267, at 40A (quoting a retired truck driver who planned to participate in civilly disobedient acts at an upcoming school board meeting to protest its racism, "[i]f we don't protest, our voices will not be heard").

n286 See Williams, supra note 75, at 706. Where the regulation impacts on an expressive aspect of speech, there are no adequate alternatives. It is true that verbal and written means of expression are left open when symbolic speech is foreclosed. But saying "I hate and resist the Vietnam War" was no more an adequate alternative for O'Brien than if Thomas Jefferson had been forced to write that "The tree of liberty must be refreshed from time to time with the blood of patriots and very bad rulers." Id.

n287 That normally respected, law-abiding citizens feel strongly enough about an issue to break the law and subject themselves to punishment is often an important part of the message. See, e.g., Inside Politics (Cable News Network, July 20, 1995) (describing arrests for civil disobedience protesting university admissions policy as "planned in advance, and announced in advance and [involving] six prominent local people").

n288 See, e.g., Barbara Reynolds, Lessons of Dignity from 40 Years Ago, Des Moines Register, Dec. 4, 1995, available in 1995 WL 7222778 (describing Rosa Park's protest as arising not from "hurt feet" but dignity).

n289 The sole purpose of this example is to make a point about the message conveyed by illegal conduct. It is not at all clear that the Oklahoma City bombing would qualify as expressive conduct. Neither an intent to communicate nor a message reasonably understandable to an audience are certain. Moreover, the act certainly would not qualify as socially valuable civil disobedience because of its personally-directed violence and the fact that the perpetrator did not willingly accept the punishment for the illegal action.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Of course, that the mode of communication is lawbreaking injects other types of noncommunicative harms into the balance. In the case of the Oklahoma City bombing, which claimed 168 lives and resulted in countless physical and emotional injuries, those harms unquestionably justify the government in absolutely prohibiting anyone, ever, to choose bombing as a means of communicating his or her minority opposition to the actions of the majority-established political order. The fact remains, however, that no other means communicates the same message as breaking the law. Excising it from the political dialogue has constitutionally significant consequences. In many other instances, the Court has recognized the distinct communicative impact of even "distasteful mode[s] of expression." n290 The same should be true even when the means involved breaking the law.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n290 Cohen v. California, 403 U.S. 15, 21 (1971) (reversing a disturbing the peace conviction of draft protester who wore a jacket into the Los Angeles County Courthouse emblazoned with "Fuck the Draft").

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

3. The Likely Lesser Value of the Government's Interest as Applied to Civil Disobedience

The analytically sound justification for penalty enhancement is that the characteristic that triggers the enhancement, when combined with the base conduct, creates harms "special" and greater than the conduct alone. n291 Where the base conduct is political protest, this conclusion is doubtful. Specific types of enhancements may isolate victim-targeting action, n292 concerted or repeated action, n293 or purposeful action more generally, n294 but where purposefully choosing the victim is for a publicly communicative purpose, it may not result [*243] in the individual or social harms that prompted the enhancement. n295 Concerted or repeated action, when the association or repetition is a tool of public dialogue, may correlate to more effective political expression n296 rather than a coercive criminal monopoly. n297 In

addition, whereas purposefulness in lawbreaking usually correlates with greater social evil, such a correlation is less certain with the civil disobedient who purposefully breaks the law to produce dialogue-a social value, along with the noncommunicative harms that incidentally accompany the conduct. All of these considerations mean that, in many particular instances where a penalty enhancement may be applied to civilly disobedient conduct, the triggering characteristic may not effectively segregate more individually and socially harmful behavior from the broader class of conduct that produces the same functional harms.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n291 See discussion supra Part III.C (detailing the proper place of penalty enhancements in the clarified free speech model).

n292 See, e.g., Wis. Stat. 939.645 (1989 1990) (cited in Wisconsin v. Mitchell, 508 U.S. 476, 480 (1993) (enhancing the penalty for a defendant who "[i]ntentionally selects" the victim according to certain characteristics)); Freedom of Access to Clinic Entrances Act, 18 U.S.C. 248(a)(1) & (c) (1994) (enhancing penalty for a defendant who "intentionally injures, intimidates or interferes" with a person "because that person has been . . . obtaining or providing reproductive health services").

n293 See, e.g., Racketeer Influenced and Corrupt Organizations, 18 U.S.C. 1962(c) (1994) (enhancing penalty for participating "in the conduct of [an] enterprise's affairs through a pattern of racketeering activity").

n294 For example, punitive damanges are awarded when the defendant is guilty of "a bad state of mind." Dobbs, supra note 102, 3.11(2), at 468.

n295 The greater individual and social harms that prompt enhancements stem from the fact that the illegal action is individually directed. Specifically, with hate crime enhancements, the additional harms include a greater likelihood of retaliation and greater fear and unrest. These harms seem less likely to occur when an individual like the one in the hypothetical, though chosen for his characteristics, is intended as a public model. The public-directed nature of the conduct would likely diffuse the individually retaliatory impulse as well as be less likely to raise fears of widespread duplication of the conduct against other private individuals. FACE requires slightly different analysis because it was directed against political protest. However, not all protests result in the same individual and social harms. The two-time church meeting protesters of the example would appear to cause individual and social harms of quite a different magnitude and nature than persistent, repeated, often personally violent anti-abortion protesters whose activities prompted FACE's enactment.

n296 See, e.g., NAACP v. Claiborne Hardware Co., 458 U.S. 886, 907 (1982) ("'[T]he practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process.'" (quoting Citizens Against Rent Control Coalition for Fair Hous. v. City of Berkeley, 454 U.S. 290, 294 (1981))).

n297 See id. at 910 ("Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action.").

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

4. Disproportionate Viewpoint Impact on Political Dissenters

The breadth of a penalty enhancement provision may demonstrate that the government did not intend to target political dissenters, but a proper constitutional balance looks to disproportionate viewpoint impact even absent a government purpose to suppress dissent. And penalty enhancement provisions, to the extent that they sweep civilly disobedient conduct within their scopes, surely have such an impact.

In fact, penalty enhancement provisions, as applied to the segregable class of expressive conduct, have the same effect as would a provision that enhanced the punishment for any crime if it was committed "for the purpose of political [*244] protest." Specifically, penalty enhancements, as opposed to base penalties, act only upon conduct already illegal for reasons other than those that trigger the additional punishment. Because penalty enhancements apply only to lawbreakers, their application will have a disproportionate silencing effect on political dissenters, as opposed to those who agree with majority rulemaking, as the latter would be unlikely to break the law in order to praise it.

The explicitly discriminatory rule penalizing political protesters would require strict scrutiny under either the current or clarified free speech model. n298 The discriminatory impact of the broader enhancements, however, even without an explicit governmental intent to do so, distorts the marketplace of ideas in a constitutionally significant way. n299 It is most crucial to guard dissenting points of view from unconscious as well as purposeful silencing because the minority viewpoints are the most likely to be ignored in the majority decisionmaking process. n300 Across the board, in any particular instance when considering the adoption of a penalty enhancement provision, lawmakers are likely to be insensitive, or perhaps even hostile, to the interests of whatever small minority may want to communicate their dissent through the means of breaking the law. Penalizing lawbreakers more heavily through penalty enhancement provisions that effectively correlate to their protest purpose disproportionately silences one side of the political debate about the validity of majority rulemaking. As with speech restrictions, this viewpoint impact of a conduct restriction is an important consideration in the constitutional balance.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n298 The rule falls in the nebulous middle ground between content- and viewpoint-discrimination. In one sense, the anti-political protest rule deals neutrally with all topics of protest. In another sense, it discriminates against an anti- government viewpoint because people holding that point of view are the ones likely to use the means of lawbreaking to register their protest. No matter which characterization is used, however, the rule undoubtedly targets

expression and thus would be analyzed as a speech restriction, which would receive strict scrutiny whether the government's action was based upon content or viewpoint.

n299 See, e.g., Thomas I. Emerson, First Amendment Doctrine and the Burger Court, 68 Calif. L. Rev. 422, 472 (1980); William E. Lee, Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression, 54 Geo. Wash. L. Rev. 757, 764 71 (1986); Redish, supra note 213, at 130 ("That the expression is regulated for reasons other than its content makes it no less an interference with expression.").

n300 See, e.g., Charles Lawrence, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317, 349 (1987) (arguing, in the context of racism, that "unconscious prejudice presents [a problem] in that it is not subject to self-correction within the political process").

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -
[*245]

B. Striking the Penalty Enhancement Balance in Particular Situations Under the Clarified Free Speech Clause Model

Penalty enhancements on top of civilly disobedient lawbreaking presumptively violate the free speech clause both because their trigger is the socially valuable protest purpose and because that purpose, when combined with the base conduct, does not usually result in more harmful consequences than the base conduct alone. Still, the government may justify its enhancement in particular applications, either by showing that the conduct combined with the triggering characteristic does indeed result in special harms beyond those that result from the base conduct or by demonstrating that its interest in uniform enforcement outweighs the free expression interests of the few civil disobedients who may break the law for expressive reasons. The following discussion reviews the considerations that should enter into the constitutional balance with respect to the particular types of penalty enhancements that form the basis for the examples in Part I.

1. Hate Crime Statutes

Hate crime statutes bear that name for a reason: Their purpose is to penalize conduct motivated by racial hatred because of the individual and social harm that such motive-based conduct causes. The Mitchell Court acknowledged as much in referring to the Wisconsin statute as covering "bias-inspired conduct." n301 Some jurisdictions had explicitly referred to crimes evidencing "prejudice based on race" as the enhancement trigger, n302 but the more recent trend is to adopt the victim-targeting language upheld in Mitchell. n303 The broader language, which may include a range of viewpoints within its scope, insulates the statute from attack under the current free speech model.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n301 Wisconsin v. Mitchell, 508 U.S. 476, 487 (1993).

n302 See, e.g., Fla. Stat. ch. 775.085 (1985); H.R. 4797, 102d Cong. 2(b) (1992) (proposed federal statute passed by House, but not the Senate, referring to conduct "motivated by hatred, bias or prejudice, based on [certain protected characteristics]").

n303 See, e.g., H.R. 1152, 103d Cong. (1993) (newer House bill tracking the Wisconsin statute's language).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

This broader language also sweeps within its scope the student protesters of the first example. However, a more complex balance must occur for the student protesters than for the defendant in Mitchell. Most importantly, the trespass, although illegal as an invasion of property rights, is political expression. The students intend to convey a message that is likely to be understood. That the trespass is expressive does not prohibit imposition of punishment for the noncommunicative harms caused by the broad class of conduct. Consistent with [*246] a crucial prerequisite for civil disobedience, the students willingly accept that punishment, but upon accepting the punishment, as well as conforming with the other civil disobedience requirements, their conduct becomes different in a constitutionally significant way from a purely functional trespass. The latter results only in harms that are within the government's broad discretion to evaluate and punish. The former has expressive value, which triggers free speech clause analysis when a further penalty is imposed upon it.

The most deferential inquiry when the government imposes a penalty enhancement is whether the government might reasonably believe that the conduct plus the characteristic triggering the enhancement result in greater harm than the base conduct alone. With respect to the trespass at issue, the question is whether the students' choosing the "owner of property" because of race might likely lead to individual and social harms greater than the base conduct. The harms articulated by the state in Mitchell were that the base conduct plus the triggering characteristic led to crimes "more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest." n304 However, none of these harms seem to hold true in the instance of the student protest. Rather, the triggering characteristic acts in reverse, identifying a relatively rare instance where a crime has redeeming social value. Thus, it is possible that the free speech clause inquiry would terminate upon the government's failure to articulate any reason for enhancing the punishment in the particular instance of civil disobedience.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n304 Mitchell, 508 U.S. at 488.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Perhaps, however, the government could articulate some special harms that flow from basing decisions on race in any manner whatsoever, n305 or the government might point to the difficulty of distinguishing racist from racial motivation in particular instances and argue the need for uniform enforcement. Assuming these interests to be plausible, the multi-factor balancing inquiry must occur. In this inquiry, the weight, in addition to the existence, of a government interest must be determined. Applied to the example where race-targeting is used for the purpose of promoting racial tolerance, neither of the above interests appear substantial.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n305 This might be something along the lines of enforcing "colorblindness" even as to the commission of crimes. See Shaw v. Reno, 509 U.S. 630, 641 42 (1993) (recognizing a modified "constitutional right to participate in a 'color blind' electoral process" under which the government may not separate voters into different districts on the basis of race without compelling justification); see also Bush v. Vera, 517 U.S. 952 (1996) (same); Shaw v. Hunt, 517 U.S. 899 (1996) (same); Miller v. Johnson, 515 U.S. 900 (1995) (same).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Weighing against the government interest is the students' interest in their chosen means of communication. Is there an alternate, similarly effective means for the students to convey their message? No. Lawbreaking is part of the [*247] message. Student sit-ins enjoy a rich history that contributes to the message of any particular conduct, n306 and the illegal conduct will likely publicize their protest in a way they could not lawfully achieve. Applying the enhancement to political protesters will have a disproportionate impact on those with an anti- government point of view. n307 Thus, all of these factors dictate that the free speech clause forbids application of the victim-targeting penalty enhancement to the hypothetical student protest.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n306 See Brown v. Louisiana, 383 U.S. 131 (1966) (recognizing expressive value of sit-in); Ledewitz, supra note 6, at 501 ("The sit-in has been a familiar aspect of political protest since the 1950s.").

n307 See supra note 225. The line between content- and viewpoint-impact is murky. The class of anti-government protesters may be seen to represent a distinct viewpoint as against those who support the established order. Yet within the class of anti-government protesters may be those who evidence racial hatred as well as racial tolerance. Because a focus of the free speech clause is to protect dissenters against government repression, the anti-government impact should weigh against the validity of the government action.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Beyond this particular hypothetical application to civil disobedience, which, after all, will be the exception rather than the norm, the demonstrated breadth of the penalty enhancement upheld in Mitchell teaches another lesson. Where the special harms that justify a penalty enhancement correspond to a particular viewpoint, breadth is a dubious, and even perverse, guarantee of the provision's constitutionality in its entire range of applications. Specifically, the Wisconsin statute's victim-targeting trigger includes racial, along with racist, motivation. Thus a defendant who victimized recent immigrants of a particular nationality because of a belief that they would be less likely to report the crimes would qualify for the enhancement. n308 Unlike the student protesters, the enhancement trigger does not correlate to a socially valuable purpose. The base act is a functional crime that warrants no free speech clause protection absent a government purpose to suppress a particular point of view. Under the deferential rational basis standard that would apply to such a decision, including the racially motivated criminal with the racist would likely survive constitutional review.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n308 See Weinstein, supra note 112, at 364 (positing this hypothetical).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

But is this the right result from a perspective concerned with sound government decisionmaking? That is, should the constitutional incentive be to broaden the class to which a penalty enhancement may apply beyond the particular concern that prompted its enactment? The better rule is that the scope of a penalty enhancement should be defined as precisely as possible to mirror the special harms, beyond those that result from the base crime, that justify the greater punishment. If those harms correlate to the perpetrator's viewpoint on a political topic, then the constitutional analysis should explicitly recognize the [*248] expressive impact of the ostensibly conduct-directed government action. The question should be whether the special harms justify the viewpoint focus. That there are concrete, noncommunicative harms that result from the conduct plus viewpoint- motivation that do not apply if the enhancement is broadened to include other viewpoints on the same topic should weigh in favor of the enhancement's validity. Where those do not plausibly exist, the enhancement must be invalidated as a naked effort to suppress a disfavored point of view.

Such a precisely tailored enhancement might even distinguish between particular instances of political protest, validly applying to some because, despite the expressive value, the special harms that justify the enhancement exist as well. Consider the difference between the student protesters and the white supremacist who, cloaked in Ku Klux Klan garb, carries a burning cross onto an African American family's lawn, sits, and respectfully waits to be arrested. Both acts are civil disobedience, but the racist motivation of the latter must impact the constitutional analysis because it results in additional individual and social harms beyond the base trespassing conduct.

Some may be uncomfortable with a distinction between the two acts of political protest. Indeed, it smacks of governmental viewpoint discrimination which is supposed to be the greatest constitutional evil. To alleviate this impression, it is crucial to recall that forbidden governmental viewpoint discrimination targets expression, not the additional nonexpressive consequences of motive-based conduct. The latter, if they truly exist, may justify a penalty that disproportionately impacts those who hold a particular political point of view. In both the student protester and the Ku Klux Klan examples, the government was presumed to be able to articulate nonexpressive "special harms" that justified the enhancement, thereby invoking the content-neutral balancing test rather than strict scrutiny review. Pursuant to this balancing test, the student protesters would likely prevail whereas the government interest in eliminating the harmful consequences of the cross-burning would likely outweigh the social benefit of the expression.

In either case, it is the particularized balance that must determine the outcome, rather than broad generalizations. Cloaking the enhancement provision with a generalized description that includes instances where bias is not the motive provides a false guarantee of fairness. The government more harshly penalizes criminals who may not deserve the punishment so as to appear viewpoint neutral. Free speech clause analysis should not encourage this ploy. Rather, the analysis should promote careful tailoring. This means that sometimes enhancements specifically stated in terms of viewpoint will be constitutionally superior to broader enhancements because they more precisely address the government's legitimate, nonspeech-based interest. [*249]

2. Federalizing Enhancements

a. FACE

The lower courts that have examined FACE have found it constitutionally valid because it is directed at unprotected activity n309 and because it does not discriminate on the basis of political viewpoint. n310 As applied to acts of civil disobedience, both of these conclusions are questionable. First, accepting the base punishment for illegal conduct transforms civilly disobedient lawbreaking into socially valuable expression. n311 It is unprotected from imposition of the base penalty, but is protected from imposition of an enhancement absent a balance in which the harms flowing from the conduct because of its protest motivation outweigh its expressive value. n312 Second, even absent a government intent to discriminate on the basis of viewpoint, such a viewpoint discriminatory impact is the result of FACE's application. It is pro-life activists who prompted FACE's enactment, and it is to pro-life activists that FACE primarily applies. n313 Thus, neither of these observations provide the final conclusion as to whether FACE may be applied to instances of civil disobedience. Rather, a multi-factor balance must determine if the harms

of the conduct outweigh its value and thereby justify the penalty enhancement.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n309 See, e.g., American Life League, Inc. v. Reno, 47 F.3d 642, 648 (4th Cir. 1995) (stating that FACE "target[s] unprotected activity").

n310 See, e.g., United States v. Dinwiddie, 76 F.3d 913, 923 (8th Cir. 1996) ("FACE's motive requirement does not discriminate against speech or conduct that expresses an abortion-related message.").

n311 See discussion supra Part III.B.

n312 See supra Part III.A.2 and Diagrams D and G (clarifying the free speech model so that government actions impacting expressive conduct must undergo the same multi-factor balancing test that applies to content-neutral speech restrictions).

n313 See, e.g., Dinwiddie, 76 F.3d at 923 (noting, and seeming to accept, defendant's factual assertion that "the vast majority of people whose conduct [FACE] proscribes are opposed to abortion").

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

It is first necessary to clarify exactly which type of abortion protest activities may qualify as civil disobedience. These are activities where participants openly break the law and accept the punishment in order to send a public message. Many of the abortion protest activities, specifically those cited in favor of the statute's enactment, do not meet this definition, either because the acts involve personally directed violence n314 or are covert, n315 because they [*250] are not engaged in for the purpose of expression, n316 or because the expression is not publicly directed. n317 The question remains, however, whether FACE may validly apply to those protest activities that meet the definition of civil disobedience.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n314 See, e.g., Rawls, supra note 11, at 366 ("To engage in violent acts likely to injure and to hurt is incompatible with civil disobedience as a mode of address.").

n315 See supra note 238 and accompanying text (noting that civil disobedience must be public and open in order to constitute socially valuable expression).

n316 See, e.g., S. Rep. No. 93-117, at 11 (1993) ("The express purpose of the violent and threatening activity described [in this report] is to deny women access to safe and legal abortion services. Anti-abortion activists have made it plain that this conduct is part of a deliberate campaign to eliminate access by closing clinics and intimidating doctors.").

n317 Much of the protest outside abortion clinics is directed toward the individuals seeking abortions and those providing them, rather than toward the general public. See Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 769

(1994) (distinguishing between "focused picketing" and "generally disseminated communication"); Terry v. Reno, 101 F.3d 1412, 1414 (D.C. Cir. 1996) (referring to the "'sidewalk counseling'" offered by protesters to women entering abortion facilities (quoting Plaintiff's complaint)).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

As public expression on a political issue, abortion protest contributes to public dialogue. Because lawbreaking is a unique means of expression and the site of protest adds symbolic significance to the expression, enhancing the penalty for such protest actions will detrimentally affect the richness of public debate. Moreover, as noted above, enforcement of FACE's penalty enhancements will disproportionately affect not only the class of persons opposed to government policy in general, but those opposed to abortion in particular. These factors create the presumption that civilly disobedient abortion protests outside abortion clinics should be protected from penalty enhancement.

However, the legislative history n318 and judicial opinions n319 contain extensive documentation of the harms caused by abortion protests. Although many of these harms will not result from activity that qualifies as civil disobedience, some will. The issue is whether these harms are great enough to outweigh the factors in the constitutional balance that presumptively protect civil disobedience from penalty enhancement. Viewed on a case-by-case basis, [*251] and especially with respect to purely peaceful obstruction, these harms probably do not rise to this level. On a one-time basis, peaceful obstruction carries the harms of a simple trespass: It creates annoyance, inconvenience, and a temporary interference with private rights, but not much more than that.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n318 See S. Rep. No. 93-117, at 15 (1993).

n319 A New York district court has stated that: [T]he risks associated with an abortion increase if the patient suffers from additional stress and anxiety [caused by abortion protest activities]. Increased stress and anxiety can cause patients to: (1) have elevated blood pressure; (2) hyperventilate; (3) require sedation; or (4) require special counseling and attention before they are able to obtain heath care. Patients may become so agitated that they are unable to lie still in the operating room thereby increasing the risks associated with surgery. Pro-Choice Network v. Project Rescue, 799 F. Supp. 1417, 1427 (W.D.N.Y. 1992), aff'd sub. nom. Pro-Choice Network v. Schenck, 67 F.3d 359 (2d Cir. 1994), vacated in part on reh'g en banc, 67 F.3d 377 (2d Cir. 1995), cert. granted, 116 S. Ct. 1260 (1996), aff'd in part, rev'd in part, and remanded 117 S. Ct. 855 (1997).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Yet the history of protests that led to the enactment of FACE is something quite different than one-time peaceful protest. It is sustained, persistent, often individually directed, and sometimes life-threatening activity. n320 The individual and social harms that flow from this series of activities are importantly different from sporadic protests. Repetition weakens the resistance of the individual targets, thereby magnifying the harm of any particular action. The background activities form a fear-inspiring context against which any particular activity is perceived. Part of this context is that initially peaceful activities may devolve into threats or violence. This background may legitimately augment the government's interest in uniformly enhancing the penalty for engaging in certain activities that may, in some instances, be socially valuable civil disobedience that does not result in the harms that justified the enhancement's enactment. For all of these reasons, FACE may legitimately apply to the abortion protesters of the example.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n320 See, e.g., Terry, 101 F.3d at 1414 ("Reacting to a nationwide pattern of blockades, vandalism, and violence aimed at abortion clinics and their patients and employees, Congress enacted [FACE].").

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

This same conclusion is much more dubious with respect to those protesters who, like the Catholic women in the example, disrupt the exercise of First Amendment rights in places of worship. n321 That this provision was added to a statute titled in terms of "clinics" has been cited as evidence of its viewpoint neutrality. n322 In addition, because this provision does not stem from the same type of history of persistent, continuing protest, n323 it may not have the same [*252] viewpoint discriminatory impact as do the clinic-related provisions. n324 Still, it can, like the clinic-related provisions, enhance the punishment for socially valuable civil disobedience, which is a unique means of communication. Therefore, a government interest in addressing harms beyond those caused by the base act of lawbreaking must exist to justify the free speech impact of the enhancement.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n321 See 18 U.S.C. 248(a)(2) (1994).

n322 See, e.g., Michael S. Paulsen & Michael W. McConnell, The Doubtful Constitutionality of the Clinic Access Bill, 1 Va. J. Soc. Pol'y & L. 261, 287 (1994) (noting that the additional provision helps, but does not entirely alleviate, their concern that FACE is viewpoint discriminatory).

n323 The "place of worship" provision was added in response to ACT-UP's disruption of mass outside St. Patrick's Cathedral in New York, at which 4500 protesters rallied and 111 people were arrested, including 43 inside the cathedral. See Jason De Parle, 111 Held in St. Patrick's AIDS Protest, N.Y. Times, Dec. 11, 1989, at B3. Although ACT-UP has conducted a number of church protests, see Anne Howen, ACT UP: Radical Soldiers in the War on AIDS, Wash. Times, Nov. 12, 1991, at E1, its gay rights and AIDS awareness goals cause it to target a much broader range of protest cites than places of worship, see Levy,

supra note 2, at A1 (listing history of "audacious media events" staged by ACT-UP, "such as infiltrating the floor of the New York Stock Exchange, staging a mass 'die-in' in front of the White House and blocking traffic on the Golden Gate Bridge").

n324 That is, protesters may interfere with First Amendment rights at a place of worship for the purpose of publicizing many other viewpoints than gay rights.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

However, looking to the example of the church meeting disruption, the additional harms do not appear to be present. The protesters were disorderly and thereby interfered with the group's right to hold its meeting uninterrupted, but the protesters were rounded up reasonably quickly, arrested, and removed. Thus the group members could exercise their First Amendment rights without a health-endangering or psychologically traumatizing delay. n325 None of the group members experienced, or were in reasonable fear of, bodily harm due to the protest. In sum, none of the special harms that prompted enactment of FACE appear to have been present.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n325 Compare these effects with Pro-Choice Network v. Project Rescue, 799 F. Supp. 1417, 1427 (W.D.N.Y. 1992) (listing the health risks to women whose access to abortion services is impeded by protest activities) and S. Rep. No. 93-117, at 15 (1993) (noting the "traumatic effects" of abortion protests on women seeking abortions).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Moreover, the absence of a sustained history of frequently threatening and violent protest with respect to the exercise of First Amendment rights lessens the government interest in uniformly applying the penalty enhancement to individual actions that do not meet the profile of those that prompted the enhancement. n326 The relatively few church disruptions by gay activist groups is a slender reed upon which to hang a penalty enhancement provision directed at political protest even as applied to acts similar in nature. n327 However, those protests certainly do not flavor the perception of other protests that may occur on the premises of houses of worship. There has not been the magnitude of [*253] repetition that would weaken the resistance of the individual targets to any particular action. The background activities are not part of an organized effort that would form a fear-inspiring context against which any particular activity is perceived. n328 Nor is there a history of initially peaceful activities devolving into threats or violence.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n326 Unquestionably, the St. Patrick's Cathedral protest, which prompted the enhancement, was both threatening and violent. See John Leo, When Activism Becomes Gangsterism, U.S. News & World Report, Feb. 5, 1990, at 18 (describing the Sunday mass invasion that included screaming, tossing condoms, spitting

holy wafers, and protesters chaining themselves to pews).

n327 In the instance of gay church protests, there is not the alternate functional purpose of the clinic protests of stopping the act of abortion from occurring even without delivering a political message. The purpose of the trespass is solely to express a political point of view. See Levy, supra note 2, at A1 (describing numerous ACT-UP events, all of which had functional consequences, such as disrupting government services, traffic, or the activities of the stock exchange, but none of which were plausibly directed at the functional goal absent the symbolic significance).

n328 The reason that previous protests influence the perception of later ones is that they seem to form a united effort. Protests at places of worship by different individuals or groups pursuing different ideological agendas are not reasonably viewed in this way.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

In sum, the justifications for uniform enforcement of the clinic access provisions do not exist with the provisions respecting places of worship. The latter provisions were add-ons, without the extensive documentation of pervasive special harms that can justify applying a penalty enhancement to suppress socially valuable expression. Because the government interest in uniform enforcement of the abortion- related provisions of FACE does not exist with the religion-related provisions, each application of these provisions to expressive conduct, and to civil disobedience in particular, must be separately evaluated to determine whether the balance of factors justifies the enhancement.

b. RICO

The Court has noted the dual aspects of concerted action: While it poses "special dangers . . . associated with conspiratorial activity," it is a "foundation[ ] of our society" as a tool for effecting social change. n329 Particularly in the context of RICO, several Justices have cautioned courts applying its provisions "to bear in mind the First Amendment interests that could be at stake" when the defendant's activities constitute political protest. n330 Pointedly missing from the various judicial caveats, however, is a recognition that deliberate lawbreaking-particularly acts of civil disobedience-could be protected from the RICO penalty enhancement. n331

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n329 NAACP v. Claiborne Hardware Co., 458 U.S. 886, 933 34 (1982).

n330 National Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 265 (1994).

n331 See id. at 264 (expressing concern that "fully protected First Amendment activity" might result in RICO liability); Claiborne Hardware, 458 U.S. at 934 (referring to valuable concerted action as "combin[ing] with other persons in

pursuit of a common goal by lawful means").

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Instead, the Court's impliedly exact correlation of unlawful with constitutionally unprotected activity condones the lower courts' conclusions that misdemeanors such as trespass or harassment may transform protected protest activities into racketeering subject to the penalty enhancements of RICO. For the lower courts, the automatic equation is between illegal acts and "wrongful [*254] acts" that constitute Hobbs Act extortion. n332 However, where free expression, particularly political protest, is at stake, "precision of regulation" is required. n333 Speech may be protected even though it is coercive. n334 Under the clarified free speech clause model, the same conclusion should apply to expression through conduct, specifically to civilly disobedient lawbreaking. That is, the point of civil disobedience is to cause the majority to change the policies that it embodies in law. This expressive purpose has social value. The means of expression is breaking the law. Where the protester otherwise meets the requirements for socially valuable civil disobedience, the mere fact of lawbreaking should not transform valuable expression into "wrongful" extortion. Rather, where the protester accepts the base penalty, the respectful, publicly expressive nature of the lawbreaking should counsel against enhancement.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n332 See 18 U.S.C. 1951(b)(2) (1994) (defining extortion as the obtaining of "property" from another, with his consent, induced by "wrongful use of actual or threatened force, violence or fear").

n333 Claiborne Hardware, 458 U.S. at 916 (quoting NAACP v. Button, 371 U.S. 415, 438 (1963)).

n334 See id. at 910.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

In most instances where the lawbreaking constitutes civil disobedience, the balance of other factors will protect it from constituting a predicate act under RICO. As noted in the other applications, civil disobedience is socially valuable expression conveyed through a unique means. Although the government certainly did not target anti-government protesters when it enacted RICO, application of the racketeering provisions against protesters will disproportionately impact those who disagree with government policies. These factors weigh in favor of protecting expressive lawbreaking from the RICO enhancement.

On the other side of the balance is the government's interest in punishing concerted action, which is a "powerful weapon" n335 that may increase the individual and social harms of any particular action. But when concerted

action is for the purpose of delivering a public message, these additional harms might not exist. Specifically, RICO was aimed at the dangers posed by an organized, underground criminal network that credibly threatened violence as a means of obtaining property for the individual benefit of the criminal actors. In the few instances where protesters engage in or credibly threaten personally directed violence through their political expression so that their targets reasonably "fear" for their safety, the government interest in punishing the additional harms that come from concerted action may justify a penalty enhancement. Yet the Hobbs Act's "force" threshold is much lower than violence, and its alternative "fear" [*255] requirement, which includes fear of business loss or the loss of an intangible right to obtain business services, is much different than a personal safety fear. Both concepts are broad enough that, in application to protest activities, they may fail to identify those that result in significantly greater harms that outweigh the expression's social value when patterned.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n335 See id. at 932.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The examples indicate two potential applications of RICO to political protest activities. Both involve publicly directed expression on a political topic. Under the clarified free speech clause model, each requires a particularized balance to determine whether the RICO enhancement may constitutionally restrict the expression.

Because the same examples may qualify the protesters for FACE or RICO liability, the particularized multi-factor balance is the same for RICO as for FACE. Specifically, the government interest in restricting the one action of either example is not strong enough to justify the enhancement. But the different history and contexts of abortion clinic protests as opposed to place of worship protests may affect the analysis of any particular application. That is, sustained, continuing, often personally directed and/or violent history of abortion protests may affect the evaluation of whether the access-blocking prayer vigil "wrongfully" causes "fear" so as to result in "extortion." This history also adds significance to RICO's "pattern" trigger, vividly demonstrating the additional individual and social harms that planned, concerted action may pose as compared to sporadic, individual action. As with the application of FACE, this history may justify applying RICO's provisions to the protesters of the example even though their acts might not produce harms enough to justify the enhancement outside this context.

Also, as with the application of FACE, application of RICO to the church protesters is more questionable. No sustained history of obviously "wrongful" conduct forms a background for evaluating the two acts that form the RICO pattern. Rather, they stand alone, cloaked with the values that attend civil disobedience, against the dubious government interest in restricting organized

action undertaken for the purpose of public expression. In this balance, the expression should prevail-meaning that protesters may be punished for the nonspeech-related harms that their ordinary trespass causes, but not for the nonexistent additional nonspeech-related harms that flow from their patterned action.

The result in any other case of political protest activities must depend upon a fact-specific balance. Yet crucial to the balance in any particular RICO application is the recognition that civil disobedience has expressive value in the clarified free speech clause model. The line between lawful actions and those illegal for reasons independent of expression may dictate the result on a per se basis when the issue is application of a base penalty. It is too severe, however, [*256] when the subject is penalty enhancement. Although ostensibly directed at conduct, RICO sweeps within its broad scope two characteristics of First Amendment value- expression and association. When the two are combined, the resulting conduct must be presumptively protected from enhanced punishment, subject to a government showing that the patterned action results in additional harms that outweigh the social value of the expression.

3. Punitive Damages

In one sense, imposition of punitive damages for civilly disobedient actions presents the same issue as other penalty enhancements: Whether the characteristics that trigger their imposition isolate actions that result in greater harms than the base functional conduct. In another sense, however, punitive damages present a different issue. The constitutional problem with the more specific statutory enhancements is that their defining characteristics might apply to socially valuable expression. But the standard for imposing punitive damages specifically limits their range to "wanton misconduct," that amounts to "a particularly aggravated, deliberate disregard of the rights of others." n336 Because the definition seems to precisely isolate actions grossly more harmful than other functional acts within the class, it seems to solve the constitutional problem.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n336 Huffman & Wright Logging Co. v. Wade, 857 P.2d 101, 118 (Or. 1993) (Unis, J., dissenting) (quoting Uniform Civil Jury Instructions 35.01).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Although expression- and viewpoint-neutral on its face, the different problem that the broad punitive damages standard poses in application is that political protesters may be punished for their expressive purpose and perhaps for their particular, unpopular points of view. n337 Neither of these reasons constitute additional harms that justify the punitive damages penalty enhancement.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n337 See id. In his dissent, Judge Unis stated: Put in stark terms, a punitive damages standard that explicitly gives the jury discretion to award punitive damages for a tort that is committed in conjunction with or accompanied by or intertwined with a significant communicative component only if the jury determines that it is in society's best interest to punish and deter the defendant's particular political message accompanying the conduct would impermissibly punish and seek to deter speech. Id.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Because civil disobedience is expression under the clarified free speech clause model, a multi-factor balance must determine whether a punitive damages award is appropriate in any particular instance. For the reasons noted above-that it is public expression, conveyed through an unduplicable means, [*257] and penalizing it will disproportionately affect anti-government protest-civil disobedience is presumptively protected from the punitive damages enhancement. In any particular case, jury instructions must focus on nonexpressive harms and judicial review must balance those harms against the lawbreaking's expressive value. In most instances that involve no personally directed threats or violence, the judicial balance should remove the question from the jury. Where the protest actions are personally directed or, although not personally directed, are persistent so as to weaken targets' resistance, or are mixed with personally directed actions so that the latter taint the reality or perception of the former, a jury question may be presented. Specific questions could focus the jury's inquiry on the types of special harms that may justify the punitive damages enhancement. Answers to these queries then could aid judicial review.

With respect to the example of the environmental protesters, imposition of punitive damages presumptively violates the free speech clause guarantee. As a prerequisite to sending the issue to the jury, the plaintiff must articulate additional nonspeech-related harms that flow from the particular characteristics of the conduct that justify the enhancement.

In the case of a one-time protest, these special harms would not appear to be present. However, environmental protests of the type detailed in the example are not one-time events, but are part of an ongoing movement. They occur with regularity. Camps exist to train environmental protesters in "direct action" tactics. Celebrities are enlisted to participate in the protests to add to their media value. n338 For the reasons noted in the context of abortion protests, this history may affect evaluation of individual events. If the same targets are repeatedly chosen for protests, the government may have a greater interest in protecting against this added harm. If the past protests have been violent or personally threatening, this history may affect the perception of an individual instance. It is not clear that these reasons, which may constitute additional harms in the context of abortion protests, exist in the context of environmental protests. Because the protests are media events rather than functional actions

realistically calculated to protect the environment, repeated targeting of the same entity is less likely. Moreover, the protests are targeted at property rather than individuals, and therefore do not impact individual health or safety in the same way as abortion protests.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n338 See, e.g., Martinez, supra note 2, at B1 (detailing activities of Malibu Action Camp, a four day training in the techniques of civil disobedience).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

None of these considerations dictates a conclusion, but all are relevant to the constitutional balance. The crux of the inquiry with respect to imposing punitive damages on top of compensatory damages liability for protest activities must be whether nonspeech-related characteristics of the act that fall within the [*258] punitive damages instructions cause the act to result in greater harms than other acts of the same type that lack that characteristic. The answer in most cases of civil disobedience must be "No."

V. Conclusion

Civil disobedience is socially valuable expression. When, through any variety of means, the government seeks to enhance the punishment for civil disobedience beyond that applicable to the broader class of actions that cause the same functional harms the free speech clause enters the picture. The first question must be whether the characteristics that trigger the enhancement, when combined with the base conduct, result in additional harms that may justify the enhancement. If so, then under the clarified free speech clause model, a multi-factor balance must determine whether the government's interest outweighs the act's expressive value. Results will differ. But this consequence deserves applause rather than lamentation. The current free speech clause model contains the assumption that lawbreaking is once and forever into the future "unprotected." The clarified free speech clause model distinguishes between civil disobedience and lawbreaking that lacks an expressive purpose. Presumptively protecting the former from penalty enhancement more fully realizes the free speech guarantee.

LEVEL 1 - 69 OF 96 ITEMS

Copyright (c) 1994 Oklahoma Law Review
Oklahoma Law Review

SPRING, 1994

47 Okla. L. Rev. 75

LENGTH: 12823 words

SYMPOSIUM: THE LIFE AND JURISPRUDENCE OF JUSTICE THURGOOD MARSHALL: THURGOOD MARSHALL AND THE LAW LIBRARY

Copyright 1994 Maria E. Protti

Maria E. Protti*

* Associate Director of the Law Center Library and Adjunct Assistant Professor of Law, University of Oklahoma. M.P.A., 1994, University of Oklahoma; J.D., 1983 University of California at Los Angeles; cert. 1988, M.L.I.S. 1982, A.B. 1979, University of California at Berkeley. The author is grateful to Michael Scaperlanda for his review.

SUMMARY:
... -- Thurgood Marshall (explaining his success) ... At the library, Thurgood Marshall met NAACP practitioners formulating their cases and outlining their grand plan. ... This strong ability to sense legal information which was "left out" of the traditional law school library portends Marshall's later arguments in Brown v. Board of Education. ... The case is significant because it firmly set forth the prisoner's right to have access to libraries in the face of no or little lawyer representation, even on appeals. ... To allow prisoners access to a law library is to coddle them. ... "And I question what type of meaningful assistance is given the court, the Federal Judiciary, or the state judiciary, by some inmate who has a sixth grade education, who isn't trained in the law. ... The arguments against affording prisoners access to a law library mirror the arguments of an earlier time. ... He revered libraries, and his reverence appears in at least three undertakings: His systematic suing of states that segregated their academic libraries, his determination that libraries are a meaningful way for prisoners to gain access to the courts, and his placement of his personal court papers in the nation's largest public library. ...

TEXT:
[*75] I heard law books were to dig in, so I dug, way deep.

-- Thurgood Marshall (explaining his success) n1

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 With Mr. Marshall on the Supreme Court, U.S. NEWS & WORLD REPORT, June 26, 1967, at 12.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

I. Introduction

Thurgood Marshall has examined the role of the library in the working of the United States legal system more than any other Justice. n2 Justice Marshall inherently sensed that the law library was one institution that the public could rely on to elevate themselves out of the claws of poverty and racism. Marshall's idea that public libraries are an escape hatch was not purely theoretical; his conviction that libraries change lives bear from his own life story. Marshall's own advocacy reinforced and made true this belief in the import of libraries to individual Americans because his vocation had such an impact on the law. Marshall directly designed to make the library a catalyst for lifting the underclass. n3

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n2 Many recent Justices, however, have extolled libraries. Justice Sandra Day O'Connor inspires readers with her praise for law libraries. "In my work a good library is essential. It enables me to learn the background and previous discussion of the various issues I am called upon to decide. It provides the stability, and continuity for the rule of law." Letter from Sandra Day O'Connor to Bob Toiney, Public Information Officer, Pioneer Library System, Norman, Okla. (Mar. 30, 1993).

Justice Harry A. Blackburn wrote all of his opinions in libraries. For entertainment, he read the original papers of Oliver Wendell Holmes, Jr. and Louis Brandeis at the Library of Congress. Mark C. Rahdert, Preserving the Archive of Freedom: Justice Blackmun and First Amendment Protections, 97 DICK. L. REV. 437 (1993). Justice Paul Stevens kept a law library at his home. Stuart Taylor, Jr., The Last Moderate, AM. LAWYER, June 1990, at 48, 48.

Justice William J. Brennan, Jr., wrote the plurality opinion in Board of Education v. Pico, 457 U.S. 853 (1973). The opinion rejected a Board of Education's claim that it had absolute discretion to remove books from their school libraries. Id. Justice Brennan opined, "A school library, no less than any other public library, is 'a place dedicated to quiet, to knowledge and to beauty.'" Id. at 868 (quoting Brown v. Louisiana, 383 U.S. 131, 142 (1966) (Fortas, J.)). "'[S]tudents must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding.' . . . The school library is the principal locus of such freedom." Id. at 868-69 (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (quoting in turn Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (Warren, C.J.))).

n3 Marshall's arguments in Brown, and many other quests for educational equality, included the push for the desegregation of university and secondary libraries. This attack on the separation of readers by race was part of a detailed plan. See infra notes 19-26 and accompanying text.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

[*76] In Justice Marshall's mind, constitutional interpretation and notions of fairness mandated access to library materials. n4 Lack of such access translated to lack of access to courts. That translated to lack of access to justice, which translated to lack of access to better oneself and the downtrodden. It was all part of a progressive staircase in which the supporting steps are crucial to a climb to the top. Libraries are at the first step. Without finding knowledge through libraries or similar means, one could forget the climb.

- - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n4 For example, see infra notes 42-43 and accompanying text.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

This tribute will juxtapose Thurgood Marshall's respect for libraries with his sensitive regard for legal information. It will illuminate Marshall's crusade to desegregate the library, n5 and highlight his recognition that criminal defense necessitates the provision of information. n6 It will also examine the effects of Marshall's unpopular conviction that the writings he generated as a Justice belong in a public library. n7

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n5 See infra notes 34-40 and accompanying text. The lodestar case dealing with the desegregation of library services between citizens of all races is Palmer v. Thompson, 403 U.S. 217 (1971). In 1964, five African-American men tried to use a segregated public library. When the librarian denied them service, they stayed quietly in the reading room. The dissent in this case acknowledged the risk that the plaintiff took. "The price of protest is high. Negroes . . . now know that they risk losing even segregated public facilities if they dare to protest . . . segregated public parks, segregated public libraries or other segregated facilities." Id. at 269 (White, J., dissenting and quoting Circuit Judge Wisdom's dissenting argument).

The term "desegregation" is used more often in this tribute than the term "integration." This usage defers to the memory of Justice Brennan, who first substituted the word "desegregation" for the more commonly used word "integration." He thought the term to be politically more palpable to the supporter of racial separation. KIM ISAAC EISLER, A JUSTICE FOR ALL: WILLIAM J. BRENNAN JR. AND THE DECISIONS THAT TRANSFORMED AMERICA 153-54 (1993).

n6 See infra notes 41-56 and accompanying text.

n7 See infra notes 57-79 and accompanying text. Demystifying the law and the court process was a theme in Thurgood Marshall's legal career. The act of submitting his papers to the Library of Congress for public review accords with the spirits of freedom to read and to expound on the law.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Justice Marshall was cunning. He anticipated the hot arguments that undermine the public's use of the library. His counter arguments supporting the use of seemingly innocuous public libraries are found in his briefs and his judicial opinions. They are disputed years after they were first annunciated. For example, today Americans generally respect Marshall's premise that public schools are means for achieving equal opportunity. n8 Marshall's parallel views on libraries are contentious. n9 Even after his death, Marshall's writings and activities regarding libraries provoke fiery discussion. Marshall's ideas regarding prison libraries infuriate [*77] citizens enough to write letters to their local papers. n10 Ensuing debate regards the appropriateness of the placement of Marshall's papers inside a public library. The debate appears in popular legal newspapers and among librarians. In part, it emanates from the

Justices of the highest court. n11

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n8 Brown and its progeny are revered and celebrated. "There is now a large black middle class and substantial black political power (forty members of Congress, many mayors) as a result of the civil rights revolution, of which Brown was one of the main progenitors. This political and economic power is a direct concurrence of Brown's perceptions and requirements." Symposium, Does Brown Still Matter?, 258 THE NATION 718, 722 (1994) [hereinafter Does Brown Still Matter?] (written comments of Jack Greenberg). But see infra note 26 and accompanying text.

n9 There is no strong line of cases representing the specific principle that equal protection due process concerns require equal access to public libraries as they do to schools. Palmer v. Thompson is the leading case in the area. See supra note 5.

n10 To much of the citizenry, furnishing access to law libraries in the court system is a form of mollycoddling. See infra note 44 and accompanying text.

n11 See infra note 68 and accompanying text.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

II. A Policy of Desegregation

Growing up as an African-American boy in the South in the 1920's, Marshall must have felt the sting of being banned from the local, neighborhood library. His mother was a schoolteacher who encouraged reading. n12 But Marshall, like too many who grew up in the South in an age of segregated public libraries, probably had a difficult time finding books. n13 Furthermore, in the segregated Southern [*78] schools, most elementary schools for Black boys and girls had no libraries. n14 After high school, Marshall attended a small, private college for African-Americans, Lincoln University in Pennsylvania. In 1930, when Marshall was a young man, the State of Maryland refused him admission to law school because of racial bias. n15 The State thus denied him the knowledge housed in the State's academic law library. Instead, Marshall attended the Howard University School of Law, which had a small, basement library that doubled as a classroom. n16 At least one scholar has called that library a "joke by normal American standards." n17

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n12 MICHAEL D. DAVIS & HUNTER R. CLARK, THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH 39 (1992).

n13 Public libraries in the southern states were racially segregated before the Civil Rights Movement provoked a change in the 1960's. Justice Clarence Thomas remembers "stealing away to the confines of an understaffed, understocked library while a large, segregated library was closed to me." Timothy Phelps, Nominee Still an Enigma: Thomas' Views Forged by Two Black Mentors, NEWSDAY, September 8, 1991, at 7. He has reasoned, "We learned to read in spite of segregated libraries." Clarence Thomas, Climb the Jagged Mountain, N.Y. TIMES, July 17, 1991, at A21.

Ralph Ellison described the haphazard condition of libraries set-up for African-Americans.

They had to improvise a library for Negroes in Oklahoma City when I was a boy. A black Episcopalian minister wanted to do some research for his sermons and was told it was against the law for blacks to use the same library as whites. [So then T]he library department found some rooms in what had been a pool hall that has failed. They rushed in shelves, rushed in all kinds of books . . . .

George E. Curry, 'Invisible Man' Author Will Be Seen and Heard As Chicago's Library System Honors His Work, CHICAGO TRIBUNE, June 10, 1972, at N1.

Richard Wright's autobiography discussed his coming of age in the South in the 1920's. It reported a conversation Wright had knowing he could not borrow books from the local, public library.

"I want to ask you a favor," I whispered to him.

"What is it?"

"I want to read. I can't get books from the library. I wonder if you'd let me use your card?"

He looked at me suspiciously.

"My card is full most of the time," he said.

"I see," I said and waited, posing my question silently.

"You've not trying to get me into trouble, are you, boy?" he asked, staring at me.

RICHARD WRIGHT, BLACK BOY 268-69 (Signet Books 1963).

The segregation reached to the contents of the books. Marion Barry recalls: "In the segregated Negro libraries there were no books or anything about race or Negroes." The Mayor-Elect as a Young Activist, WASH. POST, Dec. 10, 1978, at C1 (edited transcript of a 1962 interview with Marion Barry). Even when present, books commenting on race were located apart from the other books.

Then at one point, I discovered in the library a case that had black books in it. They were segregated in the library, and I started reading them. I discovered a book by Claude McKay called 'Home to Harlem,' and that made a great impression because it was the first time I had read a book about ordinary, everyday colored people. And that was so exciting because I realized that if somebody was writing a book about black people, then we were important enough to write about.

Norma Libman, Writer's Faith in Herself Saw Her Through Hardship, CHICAGO TRIBUNE, Mar. 8, 1994, at 6E.

n14 Southern elementary and secondary schools for Black children had trouble acquiring modern textbooks, like the kind their white counterpart schools held. A library within a school for African-American children was rare. See, e.g., Does Brown Still Matter?, supra note 8, at 724 (written comments of Si Kahn).

"The South's segregated black schools . . . had less of almost everything material: money, books, buildings . . . ." Id. at 718. Paul Atkinson, The Principal Graduates, NEW ORLEANS TIMESPICAYUNE, June 3, 1994, at B1. "His first teaching job was at Frederick Douglass School in Gretna in 1956, an all-black school during segregation. His students had hand-me-down books. That is, if they had books at all." Id.

n15 CARL T. ROWAN, DREAM MAKERS, DREAM BREAKERS 45 (1993). Later, Marshall argued in Person v. Murray, 182 A. 590 (Md. 1936) (also reported as University of Md. v. Murray, 169 Md. 478 (1936)). The result was that the Maryland Court of Appeals struck down, on equal protection grounds, the University of Maryland Law School's exclusion of Blacks. Id. See generally David Bogen, The First Integration of the University of Maryland School of Law, 84 MD. HIST. MAG. 39 (1989).

n16 Edward A. Adams, Doors Didn't Open Easily for Howard's Class of '57, NAT'L L.J., Dec. 29, 1986, at 24, 25.

n17 Rowan, supra note 15, at 67.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Still, Marshall made use, beyond measure, of the law library at hand. While a new law student, Marshall held various school jobs and commuted from Washington, D.C., to part-time jobs in Baltimore. Later, he obtained what he considered a plum job, working as a clerk in the Howard University School of Law Library. The law students coveted that job for its perquisites and it went to the student who ranked first in the class. The position brought Marshall tuition money, books for him and his wife, and time to linger at the law school after classes each day. Most important, it gave Thurgood Marshall the ability to prepare cases for the now famous National Association for the Advancement of Colored Peoples (NAACP) legal staff. n18

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n18 Davis & Clark, supra note 12, at 48, 57.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

At the library, Thurgood Marshall met NAACP practitioners formulating their cases and outlining their grand plan. Attorney Nathan Margold formulated the crux of the plan in 1930. The plan outlined a strategy to end racial segregation in the schools. n19 Charles Hamilton Houston, Dean of Howard University Law School, contributed to the planning. He suggested that the NAACP could better attack segregation at the university or college level, than at the elementary or high school level. Houston guessed that this strategy would attract the least resistance. n20 The [*79] plan saw fruition in a national, some say international, movement for civil rights. n21 Charles Hamilton Houston, William Henry Hastie, Walter White and other famous NAACP lawyers gave Marshall sophisticated research assignments while he was still in school. n22

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n19 Walter G. Stephan, A Brief Historical Overview of School Desegregation, in WALTER G. STEPHAN & JOE R. FEAGIN, SCHOOL DESEGREGATION: PAST, PRESENT, AND

FUTURE 8, 9 (1980).

n20 MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961, at 13 (1994).

n21 See generally WILLIAM CHAFE, CIVILITIES AND CIVIL RIGHTS: GREENSBORO, NORTH CAROLINA, AND THE BLACK STRUGGLE FOR CIVIL RIGHTS (1980).

n22 Id. at 6.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The library was Marshall's gold vein, and he mined all that he could. His initial research supporting the NAACP early civil rights cases occurred late at night at the library. n23 NAACP executive secretary Walter White took part in the plotting at the library. Marshall impressed White. White said that Marshall would research "an obscure legal opinion" and that his coauthored "brief was better than many practicing attorneys." n24 Thus, Marshall began his practice by helping to develop a NAACP stratagem in the late hours at the Howard University Law Library.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n23 Davis & Clark, supra note 12, at 57-59.

n24 Id. at 58.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Marshall eschewed the traditional spooned prescription of the study of preselected cases. He could do so because he had free reign of the library, and enjoyed examining the available materials with scrutiny. As a student, Marshall discovered that the District of Columbia Municipal Code did not include the ordinances on civil rights. "Since it didn't apply to anyone but us, they left it out," Marshall said. "We eventually got to the court and got that straightened out." n25 He was immanently conscious of what was not only within the library, but what was left out of the library. This strong ability to sense legal information which was "left out" of the traditional law school library portends Marshall's later arguments in Brown v. Board of Education. n26 Traditional legal texts did not bound Marshall's conception of legal [*80] materials. As an exemplary researcher, Marshall went beyond the common, well-traveled research paths.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n25 Id. at 65. Presumably, the word "us" refers to the African-American residents of Washington, D.C.

n26 347 U.S. 483 (1954). Brown v. Board of Education also is important for its early use of statistical findings from a psychology experiment as evidence. Marshall's conception of legal materials was not bound to traditional ideas of the boundaries of casebooks. Marshall recognized that any scientifically valid social study may help a case. Here, Marshall cited a study by psychologist Kenneth Clark who found a preference in school children for white dolls over black dolls. Marshall used these findings to show that school segregation

stigmatized Black children and damaged their self-concept. Tushnet, supra note 20, at 157; see also Herbert Hovenkamp, Social Science and Segregation Before Brown," DUKE L.J., 624 (1985); MARK CHESLER ET AL., SOCIAL SCIENCE IN COURT: MOBILIZING EXPERTS IN THE SCHOOL DESEGREGATION CASES (1988).

The fruits of Brown are striking. No longer is it the norm for public schools, from the kindergarten to university levels, to separate students solely on the basis of race. John Hope Franklin, a retired African-American Duke Law School Professor, explained the change in his own life:
Sixty years ago in my home state of Oklahoma, an African American had the unattractive option, after graduating from an inferior high school, of going to a miserably poor allblack college or leaving that state to pursue higher education at his or her own expense. And one could not return at all the state to pursue graduate or professional studies.
Robert J. Bliwise added, "An African American could not even live in the town of Norman, Oklahoma, where the state university was located [because of a restrictive ordinance]."

Robert J. Bliwise, Reflections of John Hope Franklin, 2 J. BLACKS HIGHER EDUC. 68, 68 (1993/94). See generally J. MORGAN KOUSSER, DEAD END: THE DEVELOPMENT OF NINETEENTH-CENTURY LITIGATION ON RACIAL DISCRIMINATION IN SCHOOLS (1986).

Nonetheless, there is disagreement over whether school districts are fully integrated or ever were fully integrated. See Derrick A. Bell, Brown v. Board of Education and the Interest-Convergence Dilemma, 93 HARV. L. REV. 518 (1980). The article explains the failure of court mandated school desegregation and an increasing divergence of racial interest. James W. Washington has noted that predominately Black colleges are forced with the burden that they exist not as a result of segregation policiies. James A. Washington, Beyond Brown: Evaluating Equality in Higher Education, 43 DUKE L.J. 1115 (1994). See also generally the essays in SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION (Derrick Bell ed., 1980). On a very general level, see Lani Guinier, The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success, 89 MICH. L. REV. 1077 (1991), in which citizens' judicial remedies are not seen as directly challenging Euro-American interest and entrenched hegemony.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

In 1933, fresh from law school, Thurgood Marshall began a solo practice in Baltimore that focused on criminal law and civil rights litigation. n27 But practice was hard. Paying clients were few. n28 Marshall had no money to purchase a library, and had to travel across town to the Howard University Law Library to read. n29 The government did not allow Thurgood Marshall, as an African-American lawyer, to use the District of Columbia Federal Courthouse until 1941. African-Americans, could not take a bar review course in the District until 1947. African-American lawyers could not join the voluntary Bar Association of the District and make use of its library until 1959. n30 As a young lawyer Marshall required the books that a staff member of the NAACP might enjoy.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n27 Walter G. Stephan, supra note 19, at 8-9. Internal balkanization along racial lines is another form of discrimination that has not been alleviated by the Courts. "Although with Brown v. Board of Education the Warren Court

appeared to settle the question of segregated education facilities the possibility and impact of "separate but equal" schools remain a great fault line today- dividing not only advocates of civil rights and conservatives but black and white progressive school reformers." Kahn, supra note 14, at 718. For example, in universities racial divides may exist in intermural sport, major, housing, and classes. Whether due to self-selection or not, these divisions and the divisions among schools with racial heritage themes cry out for review. See Patrick Welsh, A Darker Shade of Brown: Forty Years after the Decision The Culture of Our Colleges is More Separate Than Ever, WASH. POST, May 15, 1994, at C1.

n28 RANDALL W. BLAND, PRIVATE PRESSURE ON PUBLIC LAW: THE LEGAL CAREER OF JUSTICE THURGOOD MARSHALL 7 (1973).

n29 Rowan, supra, note 15, at 70.

n30 Terry Carter, Still Awaiting the D.C. Dream, NAT'L L.J., Feb. 22, 1988, at 1, 28.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Marshall needed to affiliate with the NAACP, in part, to read the law. The NAACP could afford legal materials. In 1929, Charles Garland, a wealthy Bostonian and Harvard graduate, had established the American Fund for Public Service, Inc. (the Garland Fund). n31 That fund was a foundation that supported progressive causes including the NAACP. Garland Fund money supported the successful campaign to desegregate America through the courts. The NAACP [*81] received a hundred thousand dollars that year to carry out a campaign. The goal was to secure for Negroes "a fuller and more practical enjoyment of the rights, privileges, and immunities theoretically guaranteed them by the Constitution of the United States." n32 So the NAACP, though still a poor organization, received sufficient funds to conduct a bare bones long-range comprehensive strategy to end educational segregation.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n31 Whether the motive was from paternalism or genuine sincerity, the donor gave to a organization who made much use of the monies. Davis & Clark, supra note 12, at 63.

n32 Id. at 63-64.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Marshall joined the NAACP as a litigator and researcher. n33 After that, in every court case concerning higher educational segregation, Marshall stated clearly, in his complaints and in his briefs, the differences in the libraries at the subject educational institutions. n34 Marshall recognized that segregation occurs not just in the classroom but in the library. He believed that the educational process corrodes from denial of a better library or access to a library. In Sweatt v. Painter, n35 for instance, Marshall took care to emphasize the difference in libraries by furnishing volume counts. The University of Texas School of Law had a library of 65,000 volumes. Texas State University for Negroes had a library of 16,500 volumes. n36 Marshall calculated such emphasis. In each brief decrying school segregation that Marshall

outlined, he called attention to the subject schools' inadequate libraries. n37

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n33 It is interesting to note that in 1953, Marshall engaged Howard Jay Graham, a bibliographer employed at the Los Angeles County Law Library, to participate in the formulation of the NAACP's legal stances. Davis & Clark, supra note 12, at 19, 27.

n34 A key case in the progression is Sipuel v. Board of Regents of the University of Oklahoma, 332 U.S. 631 (1948). In Sipuel, the Court found superior the library at the University of Oklahoma College of Law in comparison to the state's new law school for Negroes. See Herma Hill Kay, David C. Baum Lecture: Models of Equality, U. ILL. L. REV. 39, 52 n.74 (1985).

n35 339 U.S. 629 (1950).

n36 Id. at 633. The final determination of the court exposed an even bleaker picture. "But the Court found that the law school for Negroes which was to have opened in Feb 1947 would have no library. Few of the 10,000 volumes ordered for the library had arrived, nor was there any full-time library." Id.

n37 What Marshall fought against is epitomized in McLaurin v. Oklahoma State Regents, 399 U.S. 637 (1950). The University of Oklahoma had refused to admit George W. McLaurin to its doctoral program in education. The district court ordered the University to provide McLaurin with the opportunity to earn a doctorate. Oklahoma grudgingly complied and restricted McLaurin, forcing him to sit at his "own" table in a roped off area when he used the University library. Davis & Clark, supra note 12, at 143. He also was confined to read on the mezzanine floor of the library. This one fact was significant enough for Justice A. Leon Higginbotham to underscore in his advice in his famous article, An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague, 140 U. PA. L. REV. 1005 (1992).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

The obvious and striking inequalities in volume counts between the Texas law school libraries were not just a reflection of racism to Marshall. The difference in libraries served to perpetuate and even elevate and strengthen the divisions in prestige and access to the courts. n38 Ultimately differences weakened the graduate's [*82] psychological ability to challenge the judicial status quo. n39 These thematic divisions run throughout Marshall's writing on the attainment of education. One of the Justice's clerks said that to Marshall: "[T]he notion that [the] government would act so as to deprive poor children of an education -- 'of an opportunity to improve their status and better their lives' -- was anathema." n40

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n38 The Court stated in Sweatt:

[T]he University of Texas Law School possess to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and

influence of the alumni, standing in the community, tradition and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close. . . The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum removed from the interplay of ideas and the exchange of views with which the law is concerned. The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he become a member of the Texas Bar.

Sweatt v. Painter, 339 U.S. 620, 637 (Vinson, J.).

n39 The NAACP brief in Brown echoes Thurgood Marshall's views: "Any distinction based upon race was understood as constituting a badge of inferiority." Brief for Appellants at 34, Brown v. Board of Education, 347 U.S. 483 (1954) (No. 1, 2, 4, 10).

n40 Elena Kagan, For Justice Marshall, 71 TEX. L. REV. 1099, 1129 (1993).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

However, Marshall saw libraries as one key to education, but law libraries as a key to influencing the courts. Knowledge is power and the legal knowledge that could be found in the library could be a key to being set free. The majority's opinion in Bounds v. Smith n41 represents a strong contention that libraries are the key to a better life and not just a means for education.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n41 430 U.S. 817 (1977).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

III. Fair Representation in Court

Bounds arose from consolidated claims asserted by inmates of the North Carolina Department of Corrections. Inmates claimed that the State of North Carolina denied them both due process and equal protection under the law by failing to provide them with adequate law library facilities. The court ordered a formal plan to provide an adequate library for indigent prisoners filing either a pro se habeas or a civil rights action. In response, the State filed a plan for legal research facilities. North Carolina and the inmates appealed concurrently. The inmates called the proffered plan inadequate, and appealed the order approving the plan. The inmates argued that North Carolina violated its constitutional obligation to protect its prisoners' rights to meaningful access to the courts. They further argued that North Carolina had failed to provide them law books or a reasonable alternative. North Carolina appealed the order for summary judgment because it contended that there was no obligation to provide prisoners with a library, or an alternative for the library.

Marshall wrote the majority opinion in Bounds v. Smith. It holds explicitly that the fundamental constitutional right of access to the courts places a

requirement on prison authorities. Prison administrators must provide prisoners with adequate law libraries or adequate assistance from persons trained in the law. Inmates need libraries to help them prepare and file legal papers. n42

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n42 Justice Marshall wrote, "We hold, therefore, that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." Id. at 828.

In short, the inmates had argued that North Carolina violated its constitutional obligation to protect its prisoners rights to meaningful access to the courts. The violation stemmed from the State's failure to provide law books for a reasonable alternative.

Inmates were expected to schedule appointments to be brought to one of the libraries in order to work on legal resources for the 13,000 separate prisons. The Supreme Court affirmed the district court's finding that the North Carolina plan was practical, economically possible, and would "ensure each inmate the time to prepare his petitions." Id. at 825.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[*83] The case is significant because it firmly set forth the prisoner's right to have access to libraries in the face of no or little lawyer representation, even on appeals. Cases following Bounds refined the principle. n43 Marshall approached Bounds from the standpoint that one cannot adequately take a stance in court nor successfully proceed without understanding the law and rules of the courts. The court will not ferret out the law. It is the duty of the petitioner or defender to present the law to the court.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n43 In Younger v. Gilmore, 404 U.S. 15 (1971), aff'g Gilmore v. Lynch, 319 F. Supp. (N.D. Cal. 1970), both the due process and the equal protection clause were cited as the constitutional source for the right of prisoners' access to the courts. Due process, as the Court pointed out, is a concept of fairness, and fairness may be flexible, so that counsel will not be required, something less, something other than counsel might be required. Id.

Justice Anthony M. Kennedy has written that Bounds v. Smith is one of "Justice Marshall's most important contributions to the Court. . . ." Anthony M. Kennedy, The Voice of Thurgood Marshall, 44 STAN. L. REV. 1221, 1221 (1992).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The established principle annunciated in Bounds is still argued outside the courts. n44 Many say that prison law libraries are a luxury. A popular argument [*84] today is that prisoners don't know how to research, don't know the court structure and the law, and, even worse, are illiterate. So, a prison law library is a waste of money. Furthermore, the convicted have had their day in court. To allow prisoners access to a law library is to coddle them. But Marshall hinted that even the services of a court appointed lawyer may be

inadequate without the backup of a library. "Such programs take many imaginative forms and may have a number of advantages over libraries alone." n45 Presumably open access to the knowledge held in a library as explained by attorneys would be the best approach.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n44 Across the nation, a huge number of letters to the editor of community newspapers serves to show the sentiment of a segment of Americans. Several illustrative excerpts from contemporary letters follow: "Meanwhile, back at the prisons, the inmates are given the best law library that money can buy and the prisoners are then turning around and filing lawsuits against the state! Talk about unbelievable!" Chris F. Hensler, To Gov. Chiles and the Florida Legislature: "Stop the Madness," ST. PETERSBURG TIMES (St. Petersburg, Fla.), Nov. 3, 1993, at 15A. Another letter stated:

As far as I'm concerned, if a person does the crime, he'd better do the time in whatever facilities available. No pool table, television or law library? Crowded? Too bad. That's the price you pay. It's no country club, although there are sure bleeding hearts who feel compelled to make it so. . . . There are several lawsuits pending against the State Corrections Department for civil rights violations. Whose civil rights? Something is seriously wrong with a corrections system that even allows a suit such as this.

Letters from Readers, MINNEAPOLIS STAR-TRIB., Jan. 11, 1994, at 10A (letter of T.C. Crosbie II). Another letter stated: "[An] example of the taxpayers money being wasted and of the terrible condition of our legal system . . . our prisons as equipped with law libraries with law books at the disposal of the inmates. . . ." Letters from the People, St. Louis Post-Dispatch, July 1, 1994, at 14E (letter of Mae Cella Ladue).

Despite a determinative ruling on the subject by the highest Court in the land, a prime example of the argument still lingering inside the courts is a federal trial court which views the provision of the law library as useless to "the great mass of prisoners." Galzerano v. Vollier, 535 F. Supp. 800 (D.N.J. 1982). "To expect untrained laymen to work with entirely unfamiliar books, whose content they cannot understand, may be worthy of Lewis Carroll, but hardly satisfies the substance of constitutional duty. Access to full law libraries makes about as much sense as furnishing medical services through books like: 'Brain Surgery Self-Taught,' or 'How to Remove Your Own Appendix,' along with scalpels, drills, hemostats, sponges, and sutures." Id. at 803.

One court has distinguished Bounds by annunciating that the Supreme Court did not have the benefit of a record showing the ineffectiveness of a law library. The court reasoned that the library must be supplemented with at least a trained inmate paralegal to serve functionally illiterate and segregated inmates. U.S. ex. rel. Para-Professional Law Clinic v. Kane, 656 F. Supp. 1099, 1105 (E.D. Pa. 1987).

n45 Id. at page 831.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

In oral arguments for Bounds, Marshall posed the question: "Are you taking this position on the theory that the law library would be useless?" n46 The

answer that the North Carolina lawyer gave Marshall revealed class struggle, thereby diluting the argument that the inmates were too ignorant to make use of the library materials:

[*85] Your Honor, perhaps to a small handful of inmates it may be useful, a small handful of inmates who perhaps have the intelligence to utilize these facilities. But as a member of the bar, quite frankly, I almost take this as a personal insult. I went through college, I went through law school, I took the bar exam, in order to be trained in legal research. n47

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n46 Transcript of the Oral Arguments of Nov. 1, 1976, at 13, Bounds v. Smith, 430 U.S. 817 (1977) (No. 75-915) in THE COMPLETE ORAL ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES, 1976 (University Publications of America 1977) [hereinafter Oral Arguments Transcript]. These transcripts do not identify the questioner as Justice Marshall, but an audiocassette from the National Archives reveals that Marshall's voice as the questioner. Chief Justice Burger introduced Marshall to announce the decision in Bounds. The announcer's voice was the same that posed the noted question.

The author first requested the tapes from the National Archives in May and after proper identification of the material the tapes were copied for the author without restriction. Prior to 1993, the public was not allowed to hold taped copies of the Supreme Court hearing. The restrictions on the use of the taped voices of lawyers appearing before the United States Supreme Court were severe. One could only hear a case three years after the Court decided the case. One could only gain access to the tapes at the National Archives main building in Washington, D.C.. The Marshall of the Supreme Court only permitted the user to hear the tapes upon proper application. To gain a copy of an audiotape, the user agreed in writing "to use such audiotape for private research and teaching purposes only." Listeners also had to sign a form agreeing that they would not "reproduce, or allow to be reproduced for any purposes, any portion of such audiotape."

Court administrators first began recording the sounds of the Court in 1955. They began to deposit the tapes into the National Archives in 1968. The National Archives has been the repository of the tapes ever since.

In an earlier writing, the author argued that the Court does have a sense of decorum and probably a healthy adverse reaction to commercialism of the court. However, the public's interest in knowing about the law and how the law is formed outweigh the court's interest in restricting the use of the tapes. Assuming that the National Archives follow procedures which will preserve the tapes, anyone should be able to copy the tapes without restriction. Any release of the tapes would not violate national security because the contents are not secret. Distribution would in fact heighten understanding of the law. Maria Protti, The Supreme Court Tapes: They Should Be Released, LISP NEWSLETTER (Am. Ass'n of Law Libraries), Fall 1993, at 7.

See generally Joan Biskupic, Supreme Court May Sue Over Release of Its Oral Arguments, CHICAGO SUN-TIMES, Aug. 30, 1993, at 40; Joan Biskupic, Marketer of Court Tapes Risks Supreme Censure: Oral Arguments of Famous Cases Were Reproduced Despite Agreement with National Archives, WASH. POST, Aug. 30,

1993, at A6; Sharon Jones, Court Finds Professor's Tapes Unappealing: Justice May Challenge Use of Material from Archives, SAN DIEGO UNION-TRIBUNE, Aug. 26, 1993, at B2.

n47 Id. Lest, anyone fail to catch the subtleties of the contrast between the class of inmates and non-inmates, counselor for the State explicitly spelled out a perception of struggle. "Question: "So you are suggesting that they [the inmates] just want you to buy books for them?" "Mr. Safron [Answer]: "Exactly, Your honor, and so that they can have a power base within the penal system. They will really become powerful then. They will be the men with the law books who will write all the petitions.'"

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The jurisprudence disagreements reflect an underlying feeling of domination and place in society. In the past, the powerful used notions concerning literacy to prevent the disenfranchised from voting. n48 Here, the powerful used literacy and research skills to prevent prisoners from understanding the law. The higher echelon could afford representation and had an interest in keeping prisoners from the library. Members of the bar had a further self-interest in mystifying the law to all but their membership. Marshall could elicit such arguments based on class strata that a lawyer would not likely articulate in a submitted brief. Unlike other Justices, Marshall did not want to do away with oral arguments. He thought, in the heat of the argument, a good Justice could draw reasoning from an attorney which the attorney failed to commit to in a brief. n49 In Bounds, Marshall showed just what a masterful questioner he was. He solicited reference of class distinction at oral argument. The solicited answer projected that, at the core, access to the library was a means of access to the courts. A privileged profession was keeping these means closed.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n48 In oral arguments, Mr. Safron, counselor for the State of North Carolina, praised the legal acuity of some of the plaintiff inmates: "Some of these counseling -- in fact, Your Honor, I will say this, there is an association, North Carolina Writ Lawyers, and those in the -- particularly the inmates here who filed the suit, they are terrific. Many of them hold themselves out as professional writ writers and they sign the pleadings." Oral Arguments Transcript, supra note 46, at 26. Ironically, the inmates initiated the original written complaint. Utimately they prevailed even though the defense argued that, as a group, they were too ignorant to read and understand the law.

n49 Stephen I. Glover, A Tribute to Justice Marshall, 14 MISS. C. L. REV. 4 (1993). "He had a real knack for asking the embarrassing, awkward question that would bring an advocate's argument to a dead stop." Id. at 4. "During the time I worked for him [Justice Marshall], I think I saw the biting edge of his goodness at its most effective when he deployed in an oral argument . . . ." Scott Brewer, Justice Marshall's Justice Martial, 71 TEX. L. REV. 1122 (1993).

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - -

The lawyer representing the State of North Carolina answered further. "And I question what type of meaningful assistance is given the court, the Federal Judiciary, or the state judiciary, by some inmate who has a sixth grade education, who isn't trained in the law. He can't help the court." n50 He

added, "I have seen cases cited -- most cases which are cited by the inmates are mis-cited or have no -- can't even be found." n51 Here, Mr. Marshall responded with satire pregnant with meaning: "I bet I have seen some you've mis-cited, too, if I looked hard enough." n52

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n50 Oral Arguments Transcript, supra note 46, at 9.

n51 Id.

n52 Id. The respondent was Jacob L. Safron, Special Deputy Attorney General of North Carolina, Raleigh, North Carolina, on behalf of the petitioners.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[*86] Marshall was far from enigmatic. The arguments against affording prisoners access to a law library mirror the arguments of an earlier time. They provoked in Marshall a frustration that rebounds the frustration of African-American leaders before him. The arguments put to Marshall in Bounds were the same arguments that defended procedures which kept African-Americans from voting. n53 The tautological reasoning concerning libraries is that prisoners are not capable of learning, and therefore they cannot understand law books, and therefore there is no basis for affording prisoners reading materials. A similar premise and conclusion is that African-Americans are not capable of learning, and therefore they cannot read and understand proposed laws, and thus there is no basis for allowing African-Americans to create law and choose legislators. Marshall could easily predict the makeup of the present and future dissent against the use of the law library. He emphasized the antithesis. Marshall believed that the State has an obligation to expose the knowledge within a library. Time has shown that many people educate themselves through the library. n54 Even with little formal education, "Jailhouse lawyers" have special incentive to educate themselves in the law and to argue with striking passion and eloquence. n55 Although most prisoners might write the pro per [*87] penned forms awkwardly, it is the fact that some completed forms are well-conceived in the face of no or little representation that Marshall thought important. n56

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n53 In the oral arguments of Bounds, another Justice posed the classic scenario recited by those who don't want Blacks to vote or to read: "Well what if an inmate comes into court and says, 'I have had a second-grade education, my IQ is 85. It is true, the State of North Carolina furnishes a lot of law books, but I simply am incapable of reading them and I am being denied a right that others who are better able to read the law books have, so I want a lawyer.'" Oral Arguments Transcript, supra note 46, at 41.

The author cannot help but think that, to Marshall, this argument was reminiscent of the literacy tests that kept Americans of African descent from the polling booths. African-Americans could not place their ballots because they were kept disenfranchised with the excuse that illiteracy combined with voting power would leade to social disorder, not education and representation. FREDERICK DOUGLASS, THE LESSON OF THE HOUR (1852) (a speech on voting rights delivered a half mile from the U.S. Supreme Court building); see also

FREDERICK DOUGLASS, STRONGER THAN SLAVERY (1863). "It is said that the colored man is ignorant and therefore he shall not vote. In saying this, you lay down a rule for the black man that you apply to no other class of your citizens. I will hear nothing of degradation or of ignorance against the black man! If he knows enough to be hanged, he knows enough to vote. If he knows an honest man from a thief, he knows much more than some of our white voters . . . ." Id., quoted in BARBARA RITCHIE, THE MIND AND HEART OF FREDERICK DOUGLASS 162 (1968). These speeches can also be found in FREDERICK DOUGLASS, THE FREDERICK DOUGLASS PAPERS: SPEECHES, DEBATES AND INTERVIEWS (1986).

Indeed, the NAACP focused on voting rights long before Marshall joined the organization, and the NAACP developed its attack on school segregation. See, for example, Quinn v. United States, 238 U.S. 347 (1915), in which the NAACP filed an amicus curiae brief on behalf of the respondent. The case centered on the 1910 Oklahoma amendment to its constitution. The admendment exempted from its literacy test all citizens, "who on January 1, 1866, or any time prior thereto, were entitled to vote under any form of government or who at that time resided in some foreign nation, and their lineal descendents." The Supreme Court determined that the law violates the Fifteenth Amendment.

n54 Prominent and influential American thinkers who have educated themselves informally in libraries include Benjamin Franklin (THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN (Leonard W. Laboree ed., 1964)), Thomas Jefferson (NOBLE E. CUNNINGHAM, JR., IN PURSUIT OF REASON: THE LIFE OF THOMAS JEFFERSON (1987)), Abraham Lincoln (1-6 CARL SANDBURG, ABRAHAM LINCOLN (1941)), and Jack London (IRVING STONE, JACK LONDON: SAILOR ON HORSEBACK (1938)).

n55 Federal cases by or for prisoners have highlighted "deplorable conditions and Draconian restrictions of some of our Nation's prisons. . . [which] the federal courts have rightly condemned." Bell v. Wolfish, 441 U.S. 520, 562 (1979) (Rehnquist, J., majority). "The lower courts have learned from repeated investigation and bitter experience that judicial intervention is indispensable if constitutional dictates -- not to mention considerations of basic humanity -- are to be observed in prisons." Rhodes v. Chapman, 452 U.S. 337, 354 (1981) (Brennan, J., concurring).

n56 The importance of prison law libraries can only grow as the number of inmates grows. At the end of 1990, there were 738,894 Americans incarcerated in both federal and state prisons. In 1970, shortly after Bounds was decided there were 196,429 Americans incarcerated in both federal and state prisons. STATISTICAL ABSTRACTS OF THE U.S., 1993, at 197 chart no. 329 (1992).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Marshall saw the person with access to the law library as having a greater opportunity to influence the court than a person without access to a law library. Justice Marshall said: "Now, he is on one side of the case and, . . . you and your office is on the other side. You have blank number of assistants, blank number of para-legals, blank number of libraries and everything, and [you say] that is an equal play, where in my mind it is not." n57

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n57 Oral Arguments Transcript, supra note 46, at 9. Moreover, Justice Marshall was cognizant of the possibility of not meeting the need for legal

information among inmates in outlying, rural areas. He asked: "What happens out in County A, way out in the woods, where the inmate doesn't have a library, the judge doesn't have a library, the state's attorney doesn't have a library?" Id. at 22.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

To Marshall, libraries were not holding sacristies for the legal brethren. Instead, the library houses the collective wisdom of the law and knowledge of the law is one key to bettering one's position in society. The contents of the library are for all.

IV. The Triumph of Public Access

Besides the law library as a public institution which can aid in understanding the law, Marshall saw libraries as a collective depository for governmental information. Justice Marshall's death initiated his last salute to the principle of open access to legal materials. Thurgood Marshall had given his papers to the Library of Congress, but specified that he would control access over his papers until his death. He agreed in writing that his papers be made available for inspection without restriction after his death. n58

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n58 The Instrument of Gift, signed by Thurgood Marshall on October 24, 1991, was clear:

I, Thurgood Marshall (hereinafter: Donor), hereby give, grant, convey title in and set over to the United States of America for inclusion in the collection of the Library of Congress (hereinafter; Library), and for administration therein by the authorities thereof, a collection of my personal and professional papers, more particularly described on the attached schedule.

I hereby dedicate to the public all rights, including copyrights throughout the world, that I may possess in the Collection . . . .

Thurgood Marshall, The Instrument of Gift Donating Papers to the Library of Congress (Oct. 24, 1991), in LC INFO. BULL., June 14, 1993, at 253.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The Library of Congress now holds the 173,700 "Marshall Papers." The collection covers papers from the time when Marshall was a lawyer for the NAACP (1940-61) and when he was a court judge (1961-65). It also covers the periods [*88] during his tenure as U.S. Solicitor General (1965-67) and as Supreme Court Justice (1968-91). Included are memoranda between the justices, draft opinions, vote tallies, and other administrative documents. n59

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n59 The Thurgood Marshall Collection: Press Stories Stir Furor Over LC's Opening of Papers, LC INFO. BULL., June 14, 1993, at 231 [hereinafter Press Stories Stir Furor]. "The collection would fill a wall of bookshelves 8 feet high and nearly 30 feet long; the Supreme Court files more than 3,000 cases." Id.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

The Library of Congress for some time has held the historic papers of the NAACP Legal Defense and Educational Fund. No doubt Marshall had a hand in their deposit. He was director of and lawyer for the funds for twenty years. n60

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n60 Tony Mauro, Preserving Marshall's Greatness, TEX. LAW., Feb. 8, 1993, at 18. The papers are reprinted in Papers of the NAACP, a series of microfilm edited by John H. Bracey Jr. and August Meier, and published by University Publications of America in 18 parts. Part 3 constitutes the NAACP's legal department records on the campaign for educational equality. Part 4 constitutes papers from the voting rights campaign. Parts 3 and 4 contain much of Marshall's work.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

Nonetheless, the Library of Congress restricts the use of the papers. Librarians only allow "serious" researchers to view them. The term "serious" is nebulous, and implies the use of a procedure which involves a decision to bar patrons based on purpose or personal status. Librarians require each requester to state, in writing, the reasons why the researcher wants to inspect the papers. n61

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n61 "Every patron who visits the Manuscript Division [of the Library of Congress] must be over college age, engaged in serious research that the manuscript collections can support and obtain a library user's card, which requires showing a photo ID and describing the general purpose of the work." See Press Stories Stir Furor, supra note 59, at 253.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

After Justice Marshall's death on January 24, 1992, only some scholars viewed the papers at the Library of Congress. n62 Beginning on February 2, 1993, when a patron made the first request to read, reviewers perused the papers without fanfare. n63 The following May 23, the Washington Post published the first article in a three-part series on the papers. n64 Those articles brought attention to the papers. The articles sparked consideration on who could read the papers and whether the Library of Congress should allow any reading at all. Readers reacted strongly to the Post articles. Scholars and newspaper reporters rushed to the Manuscript Division of the Library of Congress' Manuscript Division to view the papers. n65 Justice Marshall's colleagues on the Supreme Court, some members of Justice Marshall's family, and others became angry. They did not believe that Justice Marshall wanted his papers made public upon his death. n66

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n62 Robert Ritter, Courts Split on Marshall Papers: Brethren Divide -- Again -- over 'Early' Release" The Papers of Supreme Court Judge Thurgood Marshall, THE QUILL, Oct. 1993, at 30.

n63 Press Stories Stir Furor, supra note 59, at 231, 231, 252. "The library received not one request to use the Marshall papers during the Justices lifetime. . . . By May 5, when a Washington Post reporter arrived, six researchers had already used the collection." Id.

n64 Benjamin Weiser & Joan Biskupic, Secrets of the High Court; Papers Afford a Rare Glimpse of Justices' Deliberations, WASH. POST, May 23, 1993, at A1 [hereinafter Weiser & Biskupic, Secrets].

n65 Press Stories Stir Furor, supra note 59, at 231.

n66 "The publication of the articles has upset Cecilia Marshall, the Justice's widow, said Karn Hastie Williams, a lawyer who is a goddaughter of the late Justice." Weiser & Biskupic, Secrets, supra note 64; see also Peter Braestrup, Letter to the Editor, ABA J., Nov. 1993, at 13.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[*89] Marshall's family attorney, William Coleman, called the public viewing of the papers "an act of destroying confidentiality." n67 Former Chief Justice Warren Burger said that Marshall knew that "premature publication of internal exchanges would inhibit and perhaps seriously impair the court's work." n68 Current Chief Justice William Rehnquist wrote a letter to the head librarian at the Library of Congress. Writing for "a majority of the active justices," he warned that the justices would no longer leave their papers to the Library of Congress. n69 Political and legal commentator Bruce Fein called the library's action irresponsible because it could chill argument in the highest court. He believes that the Library of Congress abused its discretion and that the Library is failing to protect the Supreme Court's confidentiality. n70 Two former law clerks of Justice Marshall wrote that the Library should withhold documents relating to recently decided cases and those of which the Justices are still indecisive. They believe that the Library had "betrayed its own history" acting in disrespect for the confidentiality of court deliberations. n71

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - - -

n67 Neil A. Lewis, Librarian Vows to Continue Public Access to Marshall's Papers, N.Y. TIMES, May 27, 1993, at A24.

n68 Benjamin Weiser, Librarian Rejects Restrictions: Marshall Files to Stay Open Despite Pressure from Court, Family, WASH. POST, May 27, 1993, at A1 [hereinafter Weiser, Librarian Rejects Restrictions].

n69 Letter from Chief Justice William H. Rehnquist to James H. Billington, Library of Congress (May 25, 1993), quoted in Press Stories Stur Furor, supra note 59, at 231. Rehnquist wrote that the Library used "bad judgment" in its decision to grant such early access, adding that he wrote for "a majority of the active justices" in suggesting that some may choose to donate their papers elsewhere." Id.

Ironically, the papers of Justice Robert H. Jackson, held at the Library of Congress reveal that Rehnquist, while clerking for Jackson, wrote a memorandum urging the court to support precedents for racial segregation in regard to voting. The papers were uncovered soon after President Nixon nominated Mr. Rehnquist to the Court in 1971 and were cited in the course of the nomination

process. Hearings of the Senate Comm. on the Judiciary on the Nomination of William H. Rehnquist as Chief Justice of the United States, 96th Cong., 2d Sess. 25 (1971).

n70 Bruce Fein, the Marshall Papers: Was it a Mistake for the Library of Congress to Release Them? Yes: An Abuse of Discretion. ABA J., Sept. 1993, at 48.

n71 Crystal Nix & Sheryll D. Cashin, Library of Congress -- or School for Scandal, N.Y. TIMES, May 27, 1993, at A27 (letter to the editor).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Many were aghast that Justice Marshall truly wanted his working papers exposed without censorship for anyone to examine. Close followers of Justice Marshall's life understood. n72 Marshall's wish that his papers rest in the library accords with his [*90] longtime reverence for libraries and with his recognition that libraries support democracy. The widespread process of understanding the law is a theme in Marshall's career. The act of giving his papers to the public to read harmonizes with the spirit of freedom of information. Subsequent exposition has already expanded the workings of the highest court. The public now knows some informal procedure of the court and actions which contributed to producing determinations. n73

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n72 Juan Williams, a friend and biographer of Marshall, believes that Marshall's decision to release his papers "was a critical means to further his long-term goals." Juan Williams, Marshall's Plan: Prod the Living -- Why He Released His Papers, WASH. POST, May 30, 1993, at C5.
In extensive interviews with me in 1989-80, he repeated his pledge to "burn" his papers when he left office; even then, he would often offer such a statement with a mischievous grin -- he was playing the role of a cantankerous judge. . . . Yet Marshall's maneuver also served a larger vision that he held near to his heart. By allowing his papers to be viewed immediately after his death, he was continuing his role as the Supreme Court justice who would not let his colleagues forget about the impact of discrimination and poverty as they deliberated on the law of this land. The release of his papers is another reminder to the justices left behind that people are watching.

Id. Williams said that he asked Marshall for access to Marshall's papers. Williams recalls Marshall saying, "They'll be available after I die." Id.

Historian David Gowan said that Marshall gave him permission to review some of Marshall's papers. "People . . . should at least consider the possibility that the justice would have foreseen what's transpired," Gowan said. Weiser, Librarian Accepts Restrictions, supra note 68.

n73 The Marshall papers reveal a raw, uncommon look at the process the Supreme Court takes to deliberate.
[They] contain private memos and drafts of decisions that circulated among all the justices and revealed new details on how the court -- one of the government's most secretive institutions -- handled such issues as abortion, civil rights, free speech, crime and government power. . . . Normally, the public sees only portion of the court's process: a brief announcement that a

case has been accepted for a decision; written arguments; months later, the final ruling and written opinions. . . . The Marshall papers provide a wealth of material on the steps that are rarely seen: the private debate, votes, and jockeying among the justices over which cases to take and reject; the preliminary votes at the weekly justices-only conference and the crucial assignments of authors for the majority and dissenting opinions.

Included are the handwritten tallies that Marshall made of the justices' votes and whatever brief notes he took on their discussion of which issues to address or avoid.

The papers also show the draft-by-draft evolution of the written opinions, as well as glimpses of the critical negotiations as one of the justices maneuver to hold or forge a majority. . . . This is the kind of internal debate that the justices have argued should remain confidential taking the position that only their final opinions have legal authority. They have expressed concern that premature disclosure of their private debates and doubts may undermine the court's credibility and inhibit their exchange of ideas.

Weiser & Biskupic, Secrets, supra note 64. Before he was on the Supreme Court, Judge Marshall noted the secrecy of court's process of deciding. "The nine men meet in a conference, and there is considerable give and take in the conference room. And where the vote ends up by one, nobody knows how it started off." Hearings Before the Senate Comm. on the Judiciary on the Nomination of Thurgood Marshall To Be an Associate Justice of the Supreme Court, 90th Cong., 1st Sess. 7 (1967).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Subsequent controversy grew so heated that the Senate Subcommittee on Regulation and Government Information heard testimony on a possible statute to govern future access to Supreme Court justices' papers." n74 The chief librarian at the [*91] Library of Congress, James Billington, issued a detailed public statement to explain the Library of Congress' release of the papers for inspection. n75

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n74 Senate Hears the Librarian on Marshall Papers, LC INFO. BULL., June 28, 1993, at 262 [hereinafter Senate Hears the Librarian] (statement of James H. Billington before the Subcommittee on Regulation and Government Information, Senate Comm. on Government Affairs (June 11, 1993)).
[W]itnesses disagree on how long justices' papers should be withheld and how legislation or court guidelines could or should shape the disposition of justices' papers. Sen. Thad Cochran (R-Miss.) deplored access by journalists to the Marshall papers. Worried about too early disclosure of court proceedings were E. Barrett Prettyman, Jr., vice-president of the Supreme Court [sic], and Supreme Court Review Editor Dennis Hutchison . . . .

Backing LC in the Marshall affair were Ann Keeney, head of the Society of Archivists and Jane E. Kitley, executive director of the Reporters Committee for Freedom of the Press. The proceedings were shown on C-SPAN.

Id.

n75 Weiser & Biskupic, Secrets, supra note 64.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Tradition dictates that papers written by the United States Supreme Court justices are their personal property. The holder or the holder's heirs may dispose of the papers as they see fit. At least thirty-seven deceased Supreme Court members gave their papers to the Library of Congress. n76 Each justice imposed individual restrictions on the use of the papers. Librarians abide by the conditions of use outlined by the donor. They decide when to catalog the materials and when to make the materials available for inspection. n77 In conflict, the Public Documents Commission, almost twenty years ago, concluded that government workers are to forward federal records to the National Archives. n78 Federal records include "public papers," specifically legal materials filed by the parties, dockets, transcripts, and administrative documents which are official government records. Federal records also include "personal papers" defined as private or unofficial materials that pertain to a judge's personal affairs. n79 Unfortunately, in response to this report the government developed no disposition schedules for materials generated by the justices. Doctor Billington responded to the furor over the disposition of the nowcalled "Marshall Papers." He has volunteered to work with the nation's head archivist, the Supreme Court justices, and the Judicial Conference of the United States to create a disposition stream. n80 Any set procedure will probably include writing in digital form. The personal computer files of the Supreme Court Justices contain information of historical value.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n76 Senate Hears the Librarian, supra note 74, at 262, 268. "The Library houses the papers of Justices William Howard Taft, Charles Evans Hughes, Hugo L. Black, William O. douglas, and Harold H. Burton . . as well as the papers of Stone, Frankfurter, and Brennan -- among other Supreme Court Justices." Stanley I. Kutter, Misinformed Protests Over the Papers of Justice Marshall, CHRON. HIGHER ED., June 16, 1993, at B1, B7.

Justice Byron White has donated his papers to the Library of congress but restricted public viewing until ten years after his death. Sandra Day O'Connor allowed access to her papers at the library with her permission. After her death, access is to be unrestricted except for case files which will be opened after all participating Justices have retired from the Court. LC INFO. BULL. 26 (June 28, 1993).

n77 Braestrup, supra note 66. "The only 'discretion' our curators routinely sought and obtained in that instrument was the limited technical discretion to decide when all his papers were properly catalogued and ready for use." Id.

n78 NATIONAL STUDY COMM'N ON RECORDS AND DOCUMENTS OF FED. OFFICIALS, FINAL REPORT (1977). The Commissioners recommended a maximum thirty year withholding period for most federal records. They recommended a maximum fifteen year withholding period for "working papers reflecting the decision-making process." Id. at 6-8. Preservation of judicial records should be specially considered. The courts of record might preserve their own papers for long periods of time. For a lengthy discussion of the need to preserve judicial records, see id. at 19-27. Nonetheless, policy-makers should seriously consider the security drawbacks. The concepts of preservation and access intertwine. When writers

destroy their own papers, both present and future public scrutiny are lost forever.

n79 Id.

n80 Statement of James H. Billington Before the Subcommittee on Regulation and Government Information, Senate Comm. on Government Affairs (June 11, 1993), in Senate Hears the Librarian, supra note 74, at 269.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

[*92] Marshall showed his conviction that the Justices should reveal their work to posterity in two other ways. First, Marshall agreed to participate in a Federal Judicial Center oral history project funded by the Supreme Court Historical Society. Steven Carter, former clerk of Marshall in the 1980-81 term, interviewed Marshall for this project. n81

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n81 More than a dozen interviews occurred. Mauro, supra note 60, at 18.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Second, Thurgood Marshall displayed a heartfelt liking for the Supreme Court Library. In 1989, Thurgood Marshall was one of the justices n82 who took the time to interview the finalists for the position of Librarian of the U.S. Supreme Court.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n82 The other Justice who participated in the interview was Sandra Day O'Connor. Professional Excellence Required, NAT'L L.J., June 25, 1990, at S1.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

V. Conclusion

Throughout his life, Justice Thurgood Marshall followed a penchant for supporting public libraries containing legal information. He revered libraries, and his reverence appears in at least three undertakings: His systematic suing of states that segregated their academic libraries, his determination that libraries are a meaningful way for prisoners to gain access to the courts, and his placement of his personal court papers in the nation's largest public library. He did not accomplish his tasks of ensuring access to libraries for all litigants, or making governmental information accessible to the public. Marshall's early arguments foretell that the judiciary will succeed in these accomplishments.

The principle of giving equal access to publicly owned information shines through these undertakings. Marshall's view of the library may be most significant to future court decisions on the use of libraries. His idea was that the library serves not just as a custodian but as a steward of works owned by the community. It is the necessary antecedent of the conviction that a citizen has a right to use the library and examine its information. Lawyers have not presented these concepts often in the courts. Marshall's views on

the library could prove potent just as his views on classroom desegregation access and ownership foresaw change in schooling. Litigation has yet to occur in force over access to libraries.

LEVEL 1 - 70 OF 96 ITEMS

Copyright (c) The Trustees of The University of Pennsylvania
1995.
University of Pennsylvania

JUNE 1995

143 U. Pa. L. Rev. 2151

LENGTH: 30571 words

ARTICLE: THE FEMINIST CHALLENGE IN CRIMINAL LAW.

STEPHEN J. SCHULHOFER*

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

* Julius Kreeger Professor of Law and Criminology and Director of the Center for Studies in Criminal Justice, University of Chicago. Portions of this Article were presented at McGeorge Law School in November 1994, at the Annual Meeting of the American Political Science Association in September 1994, and at the University of Chicago Law School in November 1993 as the Wilbur G. Katz Lecture. Research for this Article was supported by the Russell J. Parsons Faculty Research Fund and the Sonnenschein Fund at the University of Chicago Law School. I have also benefited from the research assistance of Kimberly Dunn and Katharine Moir, and from the comments of Kathryn Abrams, Albert Alschuler, Mary Coombs, Anne Coughlin, Deborah Denno, Joshua Dressler, Leslie Goldstein, Elena Kagan, Dan Kahan, Jane Larson, Larry Lessig, Dorothy Roberts, Cass Sunstein, Michael Vitiello, Joan Williams, and Laurie Wohl.

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

SUMMARY:
... Yet, across a wide range of issues, the feminist position has its basis in a simple fact that cannot be considered debatable: criminal law is, from top to bottom, preoccupied with male concerns and male perspectives. ... As Lawrence Sherman writes, using mandatory arrest to fight domestic violence "may make as much sense as fighting fire with gasoline." ... Even if the police talk privately to the victim in a separate room, the offender may perceive that her preferences control the arrest decision, and if so, the escalation effects of arrest could be aggravated. ... As in the case of arrests for domestic violence, the law is quite preoccupied with the nuances of the relationship between the alleged offender and the victim. ... Compared to a male prisoner, a female prisoner is twice as likely to have dependents who lived with her prior to her incarceration. ... Since the early 1980s, the male prison population has grown by 112%, while the female prison population has grown by 202%. ... The court supported that conclusion by noting that, compared to the women's prison, the men's prison housed six times as many inmates, had a higher security rating, and the average stay for its inmates was two to three times longer. ...

TEXT:
[*2151]

INTRODUCTION

Feminist criticism of criminal law and criminal justice administration has proliferated over the past decade and now touches scores of doctrinal, practical, and theoretical issues. These critiques and the associated proposals for reform are usually acknowledged to be controversial (and even "radical") by proponents and opponents alike. Yet, across a wide range of issues, the feminist position has its basis in a simple fact that cannot be considered debatable: criminal law is, from top to bottom, preoccupied with male concerns and male perspectives.

In this Article, I explain why this seemingly tendentious claim is not only accurate but uncontroversial. I then seek to show how the male orientation of existing criminal law creates both the necessity for reform and a major obstacle to doing it well.

The feminist challenge is to adapt male-oriented criminal laws and practices to the concerns of a group of victims and offenders who are normally left out of the picture. This turns out to be difficult, and not just because of a lack of empathy for the needs of women. Factoring female victims and female offenders into the criminal law equation is hard because of many conflicting concerns and commitments that most Americans share. Three conflicts in particular will be central to the discussion that follows.

First, although we want women to be treated the same as men, sometimes equality cannot be achieved by treating two groups of people the same way. We need to take differences into account. [*2152] Yet drawing categorical distinctions between men and women undermines our ideals. This is the familiar debate concerning sameness versus difference. It pervades discussions of gender in other areas of the law and discussions of equal treatment for racial minorities, the handicapped, and other groups. n1 The debate plays out with some unexpected twists in criminal justice.

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 See, e.g., MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 21 (1990) ("The dilemma of difference grows from the ways in which this society assigns individuals to categories and, on that basis, determines whom to include in and whom to exclude from political, social, and economic activities.").

- - - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

A second dilemma is that we want to be sensitive to the nuances of context when gender issues are at stake. But effective protection of women also requires that women have clear-cut rights protected by clear rules. This is the old debate concerning rules versus discretion. Again, it plays out with some unexpected twists in criminal justice.

A third dilemma concerns the limits of theory. We need theory to help pinpoint the problems confronting women and to help organize thinking about solutions. But theory is not up to the task. Indeed, I will argue that in criminal justice, theory can never be equal to the task.

Much of contemporary feminist discussion and scholarship center on developing new theories or on parsing the differences among theories and defending commitments to one of them or another. One theory emphasizes formally equal treatment. n2 A major competitor is a theory stressing the ways that culture and social practice subordinate women under laws that are formally neutral. n3 A third theory emphasizes context, caring, and connection in lieu of what it views as a "male" commitment to abstract rights defined without regard to context. n4 One scholar has identified [*2153] seven distinct feminisms: liberal, radical, marxist, socialist, psychoanalytic, existentialist, and post-modern. n5 And that taxonomy still leaves out a few. n6 We can say, with only slight exaggeration, that feminist legal theory and feminist jurisprudence have become synonyms for feminist scholarship in law schools today. n7

- - - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n2 See, e.g., Wendy W. Williams, The Equality Crisis: Some Reflections on Culture, Courts, and Feminism, 7 WOMEN'S RTS. L. REP. 175, 175 (1982) (stating that courts should "rule that the privileges the law explicitly bestows on men must also be made available to women"); Wendy W. Williams, Notes from a First Generation, 1989 U. CHI. LEGAL F. 99, 99 (identifying the "'formal' equality" approach as "an insistence that laws not embody explicit sex-based distinctions").

n3 See, e.g., CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 40 (1987) (discussing the "dominance approach" to the equality question); Christine A. Littleton, Reconstructing Sexual Equality, 75 CAL. L. REV. 1279, 1282-84 (1987) (noting that courts routinely apply "phallocentric standards 'equally' to men and women's different reproductive biology or economic position to yield . . . unequal results for women").

n4 See, e.g., CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 17 (1982) (discussing the importance of the ethic of care to women's self-definition).

n5 See ROSEMARIE TONG, FEMINIST THOUGHT: A COMPREHENSIVE INTRODUCTION 1-8 (1989).

n6 See, e.g., Katharine T. Bartlett, Feminist Legal Methods, 103 HARV. L. REV. 829, 836-67 (1990) (discussing feminist practical reasoning, consciousness-raising, and related methods of epistemological inquiry).

n7 There are, to be sure, significant counterexamples: some recent legal scholarship considers potential reform with a close eye on the institutional or doctrinal specifics of legal change. See, e.g., Mary E. Becker, Politics, Differences and Economic Rights, 1989 U. CHI. LEGAL F. 169, 171 (discussing the economic effects of formal equality); Herma H. Kay, Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath, 56 U. CIN. L. REV. 1, 3 (1987) (exploring the concrete effect of no-fault divorce reforms); Jane E. Larson, "Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction, 93 COLUM. L. REV. 374, 454-71 (1993) (examining specific elements of a legal cause of action for sexual fraud); Deborah L. Rhode, Feminism and the State, 107 HARV. L. REV. 1181, 1195, 1197-98 (1994) (focusing on institutional details necessary to promote feminist goals in the areas of physical security and equal employment opportunity). A related example, largely pragmatic in tone, although not as detailed in its reform

prescriptions, is SUSAN ESTRICH, REAL RAPE 80-91 (1987) (discussing various reform statutes focusing on the problem of rape).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

I do not attempt here to define and distinguish the many varieties of feminist theory because I wish to draw attention to a problem that is common to all of them. The difficulty, not a new one, is that broad propositions do not solve concrete cases; or they solve too many cases very poorly. The problems confronting women in criminal justice run so deep and have such complex links to the goals and structures of law that theory is inherently incapable of carrying us very far along the path toward effective solutions. The problems can be worked out only by paying close attention to particulars.

I begin this Article by describing how the criminal justice system is dominated (incontrovertibly so) by a preoccupation with men and male perspectives. I then focus on four problems that particularly concern women as potential victims or offenders -- domestic violence, rape, sentencing policy, and prisons. Finally, drawing some common lessons from the four discussions, I suggest the need for a rather skeptical attitude toward high theory in the [*2154] search for a feminism that can guide reform in criminal justice and, perhaps, other areas. Despite the undoubted importance of theoretical insight, the most effective tools of reform at the present juncture are likely to be eclectic and atheoretical, and the most effective feminist scholarship is likely to be one that attends to the complexities of specific institutions and procedures. What is needed, I suggest, is a feminism of particulars, a recognition that real solutions are likely to lie deeply embedded in the details.

I. WHY CRIMINAL LAW IS "MALE"

The criminal justice system fits almost perfectly Lincoln's conception of a government of the people, by the people, and for the people. It fits perfectly, if you are willing to equate "the people" with the male half of the population. Criminal law is -- and has been for centuries -- a system of rules conceived and enforced by men, for men, and against men.

There are counterexamples but not many. The law against prostitution, which might make sense as a way to protect young and poor women from sexual exploitation, is not enforced that way. It is enforced almost exclusively against women. n8 The law notices women but prosecutes those it should be protecting. In many instances law enforcement does benefit and protect women. But overwhelmingly, criminal law is designed and implemented with men in mind.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n8 See, e.g., RICHARD SYMANSKI, THE IMMORAL LANDSCAPE: FEMALE PROSTITUTION IN WESTERN SOCIETIES 88 (1981) (noting that although New York law was changed in 1964 to criminalize both male prostitution and the act of patronizing a prostitute, the effect of the change was minimal; in 1977, the number of males arrested was less than one-tenth the number of females arrested). Recent attention to the need for sanctioning prostitutes' customers has not substantially changed this picture. See Eleanor M. Miller et al., The United States, in PROSTITUTION: AN INTERNATIONAL HANDBOOK ON TRENDS, PROBLEMS, AND POLICIES 300, 313 (Nanette J. Davis ed., 1993) (noting the persistence of

arrest patterns in which 70% of prostitution arrests are of females, while male customers account for only about 10% of arrests).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

This observation should be considered completely uncontroversial. One way for the reader to confirm its accuracy is simply to pause for a moment and attempt to picture a typical offender. What does he look like? He is inevitably the subject of the inquiry. The criminal offender is disproportionately male, overwhelmingly so. In 1983, men and boys, 49% of the U.S. [*2155] population, represented 78% of all property offenders and 89% of all violent offenders. n9

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n9 See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE 41 (2d ed. 1988) [hereinafter REPORT TO THE NATION].

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

What about victims? The Women's Movement has taught us to be far more aware of the victimization of women, and there is a widespread sense that women are disproportionately victimized by violence. n10 There is an important truth in that perception, but it is a complex truth. It is a truth that statistics seem to contradict.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n10 See S. REP. NO. 197, 102d Cong., 1st Sess. 33 (1991) ("Women bear the disproportionate burden of some of the most pernicious crimes, like rape, and some of the most persistent crimes, like beatings in the home."); S. REP. NO. 545, 101st Cong., 2d Sess. 30-31 (1990) (noting "a spiralling 'gender gap' of violence . . . [in which] female victimization is increasing faster than male victimization (at least for some crimes)" (citations omitted)).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The victims of reported crime are disproportionately male, again overwhelmingly so. Justice Department statistics indicate that compared to women, men are 123% more likely to be the victims of robbery and 161% more likely to be the victims of an aggravated assault. n11

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n11 See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION 1991, at 6 (1992) [hereinafter VICTIMIZATION IN 1991].

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

One's immediate reaction, given widespread perceptions of disproportionate victimization of women, is that statistics of this kind must be distorted, and in part this is true. The great majority of victims of domestic violence are female. n12 Outside of prisons and other custodial institutions, over 90% of rape victims are [*2156] female. n13 Yet rape and domestic violence are vastly underreported and underprosecuted. n14

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n12 In measuring domestic violence, a number of surveys suggest that male partners are victimized at about the same rate as female partners. See MURRAY A. STRAUS ET AL., BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY 266 (1980) (reporting a rate of 12.0 for husband-to-wife violence compared to a rate of 11.5 for wife-to-husband violence); Murray A. Straus & Richard J. Gelles, Societal Change and Change in Family Violence from 1975 to 1985: As Revealed by Two National Surveys, 48 J. MARRIAGE & FAM. 465, 470 (1986) (reporting that in 1985, the rate of husband-to-wife violence was 113 per 1000 couples, while the rate of wife-to-husband violence was 121 per 1000 couples). But the overall data on the rates of assault by victim gender present a misleading picture because the assaults experienced by male victims tend to be concentrated disproportionately in the milder forms of slapping or hitting; the female partners are much more likely to suffer the most serious assaults. See Irene H. Frieze & Angela Browne, Violence in Marriage, in FAMILY VIOLENCE 163, 181 (Michael Tonry & Norval Morris eds., 1989) (noting that "the average number of severely violent assaults by a husband against a nonviolent wife was three times greater than the average number of wives' assaults on nonviolent husbands").

n13 The Justice Department's household survey data indicate that only 8% of reported rape victims are male, but these data do not include the rapes (largely male) that occur in institutional settings, such as prisons. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, HIGHLIGHTS FROM 20 YEARS OF SURVEYING CRIME VICTIMS 9 (1993). There are no reliable data on the incidence and prevalence of rape in prisons, but some studies, extrapolating from crude survey data, estimate that among inmates of prisons, jails, and juvenile "reform schools," there may be as many as 290,000 male rape victims per year. See Stephen Donaldson, The Rape Crisis Behind Bars, N.Y. TIMES, Dec. 29, 1993, at A11. That figure is more than double the Bureau of Justice Statistics' estimate for the number of female rape victims annually, although many believe that the number of female victims is much higher. See id. Inattention to sexual assault in prisons does not only harm the men who are its immediate victims; some observers believe that men and boys who are sexually victimized in custodial institutions are more likely to become rapists themselves when they are released. See id.

n14 See, e.g., S. REP. NO. 197, at 38 (noting that "[r]ape and domestic violence are some of the most underreported crimes in America"); S. REP. NO. 545, at 33 (noting witness testimony to the effect that "rape is still underreported and underprosecuted"); MARGARET T. GORDON & STEPHANIE RIGER, THE FEMALE FEAR: THE SOCIAL COST OF RAPE 34-37 (1991) (discussing the underreporting of rape).

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - -

For other violent crimes, victimization rates are much higher for males than for females, and reporting problems cannot explain all of the difference. Household victimization surveys, a reasonably effective check on underreporting (except for domestic violence), show much higher victimization rates for men. n15 In homicide, an offense for which victimization data are extremely reliable, we find that men and boys, 49% of the population, represent 74% of homicide victims. n16 Over their lifetimes, men are about three times more likely than women to become the victims of homicide. n17 For an African-American man, the